No. 75-212

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. DONOVAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
MARC PHILIP RICHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 513 F.2d 337. The opinion of the district court (App. D, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on March 17, 1975. A petition

for rehearing with suggestion for rehearing *en banc* was denied (App. C, *infra*) on June 12, 1975. On July 2, 1975, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including August 11, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone interception application of every person, anywhere in the world, whom the government has probable cause to believe it will overhear participating in conversations relating to the specified illegal activity.

2. Whether the government has the duty under 18 U.S.C. 2518(8)(d) to advise the court of the identity of every person whose conversations have been overheard in the course of a wire interception so that the Court may exercise its discretionary authority to serve them with a notice of interception.

3. Whether, if the government violated the wire interception statute in this case, suppression of the evidence derived from the intercept is justified.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in Appendix E, *infra*.

STATEMENT

1. On November 28, 1972, Chief Judge Battisti of the United States District Court for the Northern District of Ohio issued an order pursuant to Title III

of the Omnibus Crime Control and Safe Streets Act of 1968 authorizing the interception of communications of "Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others, as yet unknown" over two telephones used by Kotoch and Spaganlo and two telephones used by Florea in conducting an illegal gambling business. The authorization was effective for a period of 15 days (C.A. App. 66-69). On December 26, 1972, Judge Contie (of the same court) extended the November 28 order for an additional 15 days with respect to two of the four telephones originally authorized (C.A. App. 103-106); at the same time, he also issued an order authorizing interception for 15 days over an additional telephone at the same location, the existence of which had not been known at the time of the original application (C.A. App. 107-110).[1] The December 26 orders authorized the interception of communications of "Albert Kotoch, Joseph Anthony Spaganlo, Chuck [last name unknown], [first name unknown] Slyman, George M. Florea, and others, as yet unknown" over the three telephones used in conducting the illegal gambling business (C.A. App. 104, 108).

On February 21, 1973, Judge Battisti ordered that notice be served upon 37 persons who had been overheard during both periods of interception (C.A. App.

[1] The December 26 orders, although issued separately by the court, were essentially a single extension of the original order; for purposes of clarity, they will be treated as such in this petition, as will the applications for the December 26 orders.

118-120). On September 11, 1973, upon motion of the government, the court ordered that notice be served upon two additional persons (C.A. App. 134-135). The government inadvertently failed to give the court the names of Merlo and Lauer, and they were not served with notices.

2. Respondents Thomas W. Donovan, Dominic Ralph Buzzacco, Vanis Ray Robbins, Joseph Francis Merlo, and Jacob Joseph Lauer, together with twelve others, were subsequently indicted for conspiracy to conduct and for conducting an illegal gambling business, in violation of 18 U.S.C. 371 and 1955 (C.A. App. 9-12).[2] The defendants filed several pre-trial motions seeking to suppress evidence derived from the wire interceptions. After an evidentiary hearing, Judge Krupansky, relying on the circuit court opinion in *United States* v. *Kahn*, 471 F.2d 191 (C.A. 7), reversed, 415 U.S. 143, suppressed as to respondents Donovan, Buzzacco and Robbins evidence derived from the December 26 interception, on the ground that the failure to identify them by name in the applications and orders of that date violated 18 U.S.C. 2518(1)

[2] Those indicted along with respondents included three persons who had been named in the original and extension applications and orders (Kotoch, Spaganlo and Chickeno) and two whose identities had only been known in part at the time of the extension application (Harvey "Chuck" Trifler and Joseph Slyman). After granting the motions at issue here, the district court severed the remaining defendants for trial: Kotoch pleaded guilty to the substantive count, Spaganlo and Trifler were convicted by the jury of conspiracy, the court dismissed the indictment as to Michael Malvasi, and the others were acquitted.

(b)(iv) and 2518(4)(a). The district court also ruled that, although Merlo and Lauer were not known until after the December 26 application, evidence derived from both periods of interception was required to be suppressed as to them because they had not been served with notice of the interception (App. D, *infra*, p. 54a).

3. The court of appeals affirmed. The panel was unanimous on the identification question (relating to Donovan, Buzzacco and Robbins) but was divided on the notice question (relating to Merlo and Lauer). On the identification question, the court relied on dictum in *United States* v. *Kahn*, 415 U.S. 143, 152, 155, and held that intercept applications and orders must identify all persons whose conversations relating to the criminal activity the government has probable cause to believe it will intercept. After agreeing with the district court's finding that the government had such probable cause as to Donovan, Buzzacco and Robbins at the time of the December 26 application,[3] the court affirmed the suppression of evidence derived from the interception order of that date (App. A, *infra*, pp. 7a-13a).

On the notice question, the majority held that the government had an implied statutory duty to inform

[3] In the court of appeals, the United States conceded that Donovan and Robbins had been "known" within the meaning of the statute at the time of the extension application. However, the government contested as clearly erroneous the district court's finding that the government was aware of the likelihood that Buzzacco would be overheard in conversations relating to illegal gambling activity.

the issuing judge of the identities of all persons who had been overheard, so that he could determine whether discretionary notice should be served upon them. Because the government had, albeit inadvertently, failed to perform this implied duty as to Merlo and Lauer, the court affirmed the district court's suppression of evidence against them derived from both periods of interception (App. A, *infra*, pp. 13a-17a). The dissenting judge agreed with the majority's suppression of the evidence against Donovan, Robbins and Buzzacco. He further agreed that there was an implied statutory duty for the government to inform the issuing judge of the identities of all persons who had been overheard. However, he would have held that suppression should not be required in the absence of bad faith or prejudice, neither of which appeared to be present in this case. Accordingly, he would have vacated the suppression order as to Merlo and Lauer and remanded to the district court for further consideration (App. A, *infra*, p. 26a).

REASONS FOR GRANTING THE WRIT

This case involves several important issues affecting the administration of the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, regulating the interception of communications in the course of investigations of certain serious crimes. The decision of the court of appeals regarding the obligations imposed upon the government by Section 2518 to identify various individuals in applications for intercept authority speaks to a question

about which there is a substantial practical need for authoritative guidance from this Court; moreover, it resolves the questions in a manner that creates grave (and, we submit, wholly unwarranted) practical problems in the administration of the Act.

In addition, the court of appeals' sweeping use of the suppression remedy, conflicting with the decisions of other circuits, implicates important issues left unresolved by this Court's decisions in *United States* v. *Giordano*, 416 U.S. 505, and *United States* v. *Chavez*, 416 U.S. 562. By suppressing the evidence against these respondents, the court of appeals has instituted a major departure from the criteria for use of the suppression remedy announced by this Court in *Giordano* and *Chavez* and has, we submit, exceeded the limits of the power to exclude evidence conferred by Congress in Section 2518(10). The remedial questions presented by this case also call for authoritative resolution by this Court.

1. The court first held that wire interception applications and orders must identify all persons who the government has probable cause to believe will participate in conversations on the target telephone lines relating to the activity being investigated. It further held that even a good faith, non-prejudicial breach of this duty to identify requires the suppression of the conversations as evidence against the unidentified individuals. This aspect of the case affects respondents Donovan, Robbins, and Buzzacco. The correctness of this holding is also the subject of the

government's pending petition for a writ of certiorari in *United States* v. *Bernstein*, No. 74-1486.

We submit that both the decision in the instant case and that of the Fourth Circuit in *Bernstein* were in error.[4] Our arguments in support of this contention are summarized in our *Bernstein* petition, a copy of which we are serving on respondents, and will not be repeated at length here. We add only that the related portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 demonstrate the correctness of our contention that Section 2518 (1) (b) (iv) requires only that the target of the interception be identified.[5]

a. Section 2518(1)(b) requires that the applicant set forth a full and complete statement of facts and circumstances relied upon to justify his belief that an order should be issued, including, *inter alia*, a description of the nature and location of the facilities from which the communications are to be

[4] As noted in the *Bernstein* petition (pp. 7-8, n. 5), a panel of the Fifth Circuit has ruled in favor of the government on similar facts. *United States* v. *Doolittle*, 507 F. 2d 1368 (petition for rehearing *en banc* granted April 7, 1975, argued June 3, 1975). A panel of the District of Columbia Circuit has followed the holding of *Bernstein*. See *United States* v. *Moore*, 513 F. 2d 485, 492-494 (petition for rehearing *en banc* pending).

[5] As in *Bernstein*, the targets of the interception in this case were named in the appropriate applications and orders: Kotoch and Spagnolo in those relating to both interceptions and Florea in those relating to the first intercept. Moreover, as in *Bernstein*, the conversations suppressed were with the named targets.

intercepted and the identity of the person, if known, whose communications are to be intercepted. The linking together of the person who is to be identified with the facilities from which communications are to be intercepted leaves little doubt that "the person" referred to in the statute is the individual who owns or regularly uses the facilities—*i.e.*, the target of the interception.[6] This conclusion is further confirmed by the fact that the New York statute from which Title III was in part derived required the identification of "the person *or persons* whose communications * * * are to be overheard * * *" (*Berger* v. *New York*, 388 U.S. 41, 59; emphasis supplied), but Congress abandoned that formulation in favor of the use of the singular.

This reading of the statute is reinforced when Section 2518(1)(b) is considered together with the subsections governing the issuance of the order. Thus, Section 2518(3) requires the issuing judge to determine, *inter alia*, that there is probable cause to believe that "an individual" is committing an offense (2518(3)(a)), that communications concerning the offense will probably be obtained through the interceptions (2518(3)(b)), and that there is probable cause for belief that the facilities or place to be monitored are being used in connection with the commission of the offense or are leased to, listed to, or

[6] When Congress intended to refer to all parties to the conversation, rather than simply the subject or target of the interception, it knew how to do so clearly. See, *e.g.*, 18 U.S.C. 2518 (8) (d), 2510(11); cf. 2511(2) (c).

commonly used by "such person" (2518(3)(d)). The purpose of this subsection is to "link up specific person, specific offense, and specific place [or facility]." S. Rep. No. 1097, 90th Cong., 2d Sess., p. 102 (1968).

Furthermore, the last paragraph of Section 2518 (4) authorizes the government to obtain a provision in the intercept authorization directing "that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that * * * [are being accorded] *the person whose communications are to be intercepted*" (emphasis supplied). The italicized phrase echoes the wording of the naming requirement in Section 2518 (1)(b)(iv) in a manner that makes it unmistakeably clear that Congress was referring in both places to the target of the interception (since the communication common carrier clearly would not be providing any services, to persons calling in from unmonitored phones, that would be subject to interference).[7]

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[7] With respect to the issue of the propriety of suppression as a remedy for a violation of the naming requirement, we also rely principally on the arguments set forth in our *Bernstein* petition. We note in addition that this Court suggested in *Chavez* that the legislative history should be considered in determining whether a particular provision of Title III was sufficiently central to the congressional scheme that its violation should lead to suppression (416 U.S. at 578, 579). As

b. The facts upon which the courts below relied to demonstrate that there was sufficient probable cause to require the identification of respondent Buzzacco, no less than those involved in *Bernstein*, demonstrate the difficulties inherent in applying the probable cause standard in wire interception cases.

The government knew that Buzzacco had at one time been a bookmaker and that two of the suspects named in the November 28 order had placed numerous calls to a telephone Buzzacco was using in Youngstown, Ohio, under the name of Tony Chesino (C.A. App. 56); the nature of the calls was not known. These facts were set out in the affidavit accompanying the application of November 28 (C.A. App. 55-58).[8] Buzzacco was not named in the application, although the agent who made it suspected that Buzzacco was involved in bookmaking with the named suspects. During the first interception, a person in Niles, Ohio, using a telephone listed to T. K. Peters and nicknamed "Buzz" or "Buzzer" was overheard discussing gambling business with several named targets.[9]

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with the provision at issue in *Chavez*, "no real debate surrounded [the] adoption" of the naming requirement (*id.* at 579), and there is only passing reference (based on erroneous legal premises) in the committee report to the purpose for inclusion of the provision in the legislation. See S. Rep. No. 1097, *supra*, at pp. 101, 102.

[8] This affidavit was incorporated into and a copy attached to the affidavit supporting the December 26 application (C.A. App. 93, 102).

[9] At some time not shown on the record but perhaps as late as December 29, 1972—after the filing of the applications

Based on this meager amount of information, the court below charged the government with knowledge that Buzzacco had moved his gambling operation from Youngstown to Niles, held that he therefore should have been identified in the December 26 application, and ruled that the failure to do so required suppression of his conversations. This set of facts, like those in *Bernstein*, illustrates the grave practical drawbacks that accompany the expansive construction given the naming requirement by the Fourth and Sixth Circuits.

2. The court below further held, this time with one judge dissenting on the suppression issue, that the government must inform the issuing judge of the identities of all persons who have been overheard, so that he may decide which of them, if any, should receive discretionary notice of the interception. Failure so to inform the judge will, the court held, result in suppression of evidence as to any person not served with notice, even though the error may have been made in good faith, and despite the absence of prejudice.[10] This issue relates to respondents Merlo and

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which the court below stated should have contained Buzzacco's identity—the government agents determined that the person at the Niles, Ohio, telephone was Buzzacco and that "T. K. Peters" was probably another alias used by Buzzacco.

[10] It is the current practice of the Department of Justice to provide the supervising judge with the name of every person who has been overheard if there is judged to be any reasonable possibility that the person will be indicted. Additional names are, of course, provided if requested by the supervising judge. That policy was meant to be followed in this case, and 39 names were in fact supplied. There was no reason other than administrative error for the failure to provide the names of respondents Merlo and Lauer. See note 14, *infra*.

Lauer. The decision conflicts with decisions of the United States Courts of Appeals for the Third, Eighth, and Ninth Circuits.[11]

This conflict in interpretation concerning a significant aspect of a federal statute itself warrants review by this Court. Moreover, the result below requires the suppression of relevant, reliable evidence, although such a remedy is neither authorized by the statute nor justified by considerations of public policy.

a. The oversight in failing to inform the judge that Merlo and Lauer were overheard violated neither

[11] *United States* v. *Iannelli*, 477 F.2d 999, 1003 (C.A. 3), affirmed on other grounds, 420 U.S. 770, and *United States* v. *Wolk*, 466 F.2d 1143, 1145-1146 (C.A. 8), hold that a good faith error in failing to provide notice of an interception is not grounds for suppression where no prejudice results. Cf. *United States* v. *Smith*, 463 F.2d 710, 711 (C.A. 10) (suppression inappropriate for non-prejudicial good faith delay in service of notice). *United States* v. *Chun*, 503 F.2d 533, 540 (C.A. 9), upon remand, 386 F. Supp. 91 (D. Hawaii), held alternatively that "[t]o discharge [the government's] obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted communication is not required, a description of the general class, or classes, which they comprise is essential to enable the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties." Here, in contrast, the court interpreted the Act as requiring just such precise identification.

the letter nor the spirit of the Act. Section 2518(8)(d) provides that notice shall be served upon persons named in the order or application and that the court may in its discretion order such service upon other parties to intercepted communications.[12] Merlo and Lauer were not named in the applications or orders pursuant to which the interception was conducted, and the district court found that this omission was proper. Therefore, they were not entitled as a matter of right to receive notice. Nor, since the judge did not order discretionary notice served upon them, did their lack of notice violate the explicit provisions of Section 2518(8)(d).

Neither was the spirit of the Act violated. The purpose of the post-use notice provision is to prevent the secret use of electronic surveillance. The provision was intended to ensure that the subject of the surveillance will eventually learn that electronic surveillance was used against him. The government's activity thereby becomes known, and the person notified may proceed with a civil action under 18 U.S.C. 2520 if he believes his rights have been violated. See S.

[12] The following information must be contained in the notice: the date the order was entered or the application denied, the period of interception authorized, and the fact that communications were or were not intercepted. Notice must be served within a reasonable time, not to exceed 90 days, after the termination of the interception or denial of the application; persons receiving notice may request the issuing judge in his discretion to allow them to inspect the intercept papers or the intercepted communications. However, on motion of the government and for good cause shown, the issuing judge may postpone service of notice beyond 90 days.

Rep. No. 1097, *supra*, at p. 105.[13] In the instant case, this purpose was amply satisfied. This was no secret wiretap—39 persons received notice of the interception.[14]

Furthermore, in the words of the dissenting judge, "it challenges credulity to conclude * * * that [Merlo and Lauer] did not have some actual notice of the interceptions" (App. A, *infra*, p. 25a). They obviously received sufficient notice to permit them to file and argue their motions to suppress; they have, in short, suffered no prejudice from lack of formal notice. Cf. *United States* v. *Cirillo*, 499 F.2d 872, 882-883 (C.A. 2), certiorari denied, 419 U.S. 1056.[15]

[13] Although, in the interest of justice, the issuing judge may order notice served upon other parties to intercepted conversations, the post-use notice provision was not intended to provide a defendant information needed for the preparation of his defense: that information is provided by the 10-day notice provision of Section 2518(9). S. Rep. No. 1097, *supra*, at pp. 105-106. The minimal amount of information provided by inventory notice clearly supports this view of the statute; bare notice of when the interception took place is of little value in preparing a defense. Under the 10-day notice provision, however, the defendant receives a copy of the order and the application. Of course, defendants normally have access to copies of the intercepted communications, as well as the intercept papers, well before the 10-day notice would be required.

[14] Apparently, the names of Merlo and Lauer were not transmitted to the judge because of a failure of communication between the FBI and the prosecutor (App. A, *infra*, p. 15a).

[15] The intercept papers remained sealed until November 26, 1973, when they were unsealed by Judge Krupansky (C.A. App. 2). Prior to that date, none of the defendants had access to the papers or the tapes of the intercepted communications; Merlo and Lauer filed their motions to suppress about two weeks after the unsealing (C.A. App. 136, 137).

b. Even assuming that the failure to advise the court that Merlo and Lauer had been overheard violated a duty imposed on the government by implication in Section 2518(8)(d), that failure does not warrant suppression as to them of their intercepted conversations. The Act identifies specifically the available grounds for a motion to suppress (18 U.S.C. 2518(10)(a)):

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Only the first is even arguably relevant here, and the plain meaning of that subsection manifestly fails to cover an interception that was entirely proper when it was made. In short, the Act does not permit suppression simply because of a technical error occurring after the interception has been completed.

Moreover, this Court has recently interpreted Title III's suppression provision as indicating that "Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures * * *." *United States* v. *Giordano*, *supra*, 416 U.S. at 527. However, not "every failure to comply fully with any requirement provided in Title III [will] render the interception of wire or oral

communications 'unlawful.'" *United States* v. *Chavez*, *supra*, 416 U.S. at 574-575. Since the post-use discretionary notice provision can hardly be considered to relate substantially to any congressional intention to limit the use of intercept procedures,[16] *Giordano* and *Chavez* indicate suppression was improper here.[17] The Court's observation in *Chavez* (416 U.S. at 572) that it did "not perceive any purpose to be served by deliberate misrepresentation by the Government in these circumstances" is fully applicable to this issue (see App. A, *infra*, p. 24a).[18]

Finally, even if there were any doubt as to the

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[16] As the dissenting judge below noted (App. A, *infra*, p. 22a):

> It is, therefore, difficult enough for me to conclude that the inventory notice provisions were intended to play a "central role" in "limiting the use of intercept procedures" where the statute specifically requires notice; it is even more difficult where notice is made discretionary and the alleged violation is not even mentioned in the statute.

[17] See, also, Commentary, *Standards Relating to Electronic Surveillance*, American Bar Association Project on Minimum Standards for Criminal Justice, p. 160 (Approved Draft, 1971) ("A failure * * * to file the inventory * * * should result in the suppression of evidence only where prejudice is shown").

[18] The duty imposed by the court below will not prevent the type of administrative error that occurred in this case—such errors are bound to occur during the investigation of complex cases, involving numerous persons who do their best to conceal their identities from the authorities. Moreover, since 39 persons were given notice here, and Lauer and Merlo filed motions to suppress promptly after the tapes were unsealed, there is no basis for any finding of prejudice.

statutory provisions discussed above, suppression for the post-intercept error involved here is precluded by the specific authorization for the disclosure at trial of communications, or evidence derived from communications, intercepted "by means authorized" by Title III. 18 U.S.C. 2517(3). An inadvertent administrative error made after the interception had been completed does not change the fact that the communications of Merlo and Lauer had been intercepted "by means authorized" by Title III.[19]

In sum, we submit that it is important for this Court to consider and affirm the governing standard as set forth by the dissent in the court of appeals (App. A, *infra*, p. 23a):

> I would limit suppression to those instances in which the government's violation was shown to be deliberate or where, if not deliberate, there is a showing of actual prejudice which cannot be cured by less drastic remedies such as compelling later disclosure or by permitting * * * "a reasonable opportunity to prepare an adequate response to the evidence which has been derived from the interception." [Citation omitted.]

3. In light of the fact that this case fully encompasses the issues presented in *Bernstein* (No. 74-1486) and presents additional important issues regarding the post-intercept notice requirements and the propriety of the suppression remedy for any vio-

[19] It may also be that admission of the incriminating statements of Merlo and Lauer is required by 18 U.S.C. 3501(a) and (e).

lations of such requirements, which issues also merit consideration by this Court and resolution of conflicting decisions with respect thereto by the courts of appeals, the Court may wish to hear this case plenarily and hold our petition in *Bernstein* for appropriate disposition in light of its decision here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MARC PHILIP RICHMAN,
Attorneys.

AUGUST 1975.

APPENDIX A

No. 74-1553

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

v.

THOMAS W. DONOVAN, DOMINIC RALPH BUZZACCO, VANIS RAY ROBBINS, JOSEPH FRANCIS MERLO AND JACOB JOSEPH LAUER, APPELLEES

Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed March 17, 1975, as amended
May 5, 1975

Before: PHILLIPS, Chief Judge, ENGEL, Circuit Judge, and CECIL, Senior Circuit Judge.

PHILLIPS, Chief Judge, delivered the opinion of the Court in which CECIL, Senior Circuit Judge, concurred. ENGEL, Circuit Judge, (pp. 15-21), delivered a separate opinion concurring in part and dissenting in part.

PHILLIPS, Chief Judge. This case involves the admissibility of evidence obtained through court-authorized telephone wiretaps. District Judge Robert

B. Krupansky suppressed evidence against the five named defendants-appellees on the ground that Government agents failed to comply with two statutory requirements. The Government appeals.

Essentially the basic question on this appeal is whether Congress meant what it said when it enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20, permitting court-authorized interception of telephone conversations under carefully prescribed restrictions.

In *United States* v. *Chavez*, 416 U.S. 562, 574-75 (1974), the Supreme Court said:

> "[W]e do not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful' . . . suppression is not mandated for every violation of Title III, but only if 'disclosure' of the contents of the intercepted communications, or derivative evidence, would be in violation of Title III."

We hold that the District Court correctly found that disclosure in the present case was a violation of Title III. We reject the Government's contention that non-compliance with the requirements of this statute can be condoned or excused on the theory that it was "inadvertent" and "unintentional" or constituted "mere technical violations."

I.

The first breach of the statute involves 18 U.S.C. § 2518(1)(b)(iv), which requires that each applica-

tion for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction which shall include, among other specified information, "the identity of the person, if known, committing the offense and whose communications are to be intercepted."

The District Court held that the defendants Donovan, Robbins and Buzzacco were "known to the Government within the meaning of the statute and that failure to include their names in the applications and orders contravenes the statute and necessitates the suppression of the contents of intercepted communications and the evidence derived therefrom as to these three defendants.

The second breach of the statute involves a failure to comply with the inventory requirements of 18 U.S.C. § 2518(8)(d), which provides that:

> "(d) Within a reasonable time but not later then ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—
>
> (1) the fact of the entry of the order or the application;
>
> (2) the date of the entry and the period of authorized, approved or disapproved in-

terception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed."

The District Court held that the defendants Merlo and Lauer were not served with notices of inventory and that in the interest of justice their communications must be suppressed.

These five defendants-appellees [1] were among seventeen persons indicted for their participation in an illegal gambling business. The two count indictment charged conspiracy and substantive violations of 18 U.S.C. §§ 371 and 1955. A large part of the evidence which supported these indictments was gathered pursuant to an order authorizing the interception of wire communications issued by the District Court on November 28, 1972. This order was granted upon application of the Organized Crime and Racketeering Section of the Department of Justice and after

[1] On January 18, 1974, the District Court ordered these five defendants severed from the remaining twelve for purposes of trial.

consideration of a forty-six page affidavit submitted by a special agent of the Federal Bureau of Investigation. The affidavit indicated that reliable informants had named certain persons engaged in illegal gambling activities and that this information was corroborated by physical surveillance and telephone company records.

The order, which was issued by Chief District Judge Frank J. Battisti, authorized special agents of the FBI:

> "To intercept wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George F. Florea, Suzanne Veres and others, as yet unknown concerning the above described offenses to and from the telephones [described in the order]."

This order terminated on December 12, 1972.

On December 26, 1972, an extension of the November 28 order was sought and approved. This new order dropped two of the four previously approved intercepts. In addition, an order authorizing intercepts for another telephone number was sought and approved. These orders terminated on January 5, 1973.

On February 21, 1973, the court ordered the service of inventory notice upon 37 individuals known to have been parties to the intercepted conversations, as required by 18 U.S.C. § 2518(8)(d). The Government subsequently checked its records and discovered that two additional parties should have been given notice. On September 11, 1973, an amended order

was filed which served inventory notice on the two additional parties. Neither submission to the District Judge named defendants Merlo and Lauer, although they were known to the Government as participants in the gambling activity whose communications had been intercepted.

II.

Congress has provided a statutory basis for suppression of wiretap evidence. 18 U.S.C. § 2515 prohibits the introduction of wiretap evidence or its fruits "if the disclosure of that information would be in violation of this chapter." The specific grounds for suppression are spelled out in 18 U.S.C. § 2518 (10) (a); an aggrieved person may move to suppress when:

> "(i) the communication was unlawfully intercepted;
> "(ii) the order of authorization or approval under which it was intercepted is sufficient on its face; or
> "(iii) the interception was not made in conformity with the order of authorization or approval."

In affirming an order to suppress pursuant to these provisions of the statute in *United States* v. *Giordano*, 416 U.S. 505, 527 (1974), the Supreme Court said:

> "[W]e think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

In *United States* v. *Chavez*, *supra*, 416 U.S. at 580, the Supreme Court held that Title III did not mandate suppression under the circumstances of that case, but said:

> "Though we deem this result to be the correct one under the suppression provisions of Title III, we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought."

III.

Title III requires that when the Government applies for a wiretap authorization, the "identity of the person, if known, committing the offense and whose communications are to be intercepted" must be disclosed specifically. 18 U.S.C. § 2518(1) (b) (iv).

There can be no doubt on the record before us that Donovan and Robbins were "known." The Government contends that Buzzacco was not "known," but, for the reasons hereinafter set forth, we agree with the District Court that the name of Buzzacco, along with the names of Donovan and Robbins, should have been disclosed to the District Judge.

Our concern in this case is whether an intercept of a conversation with three persons, known to be committing the crime for which the intercept is authorized, yet unnamed in the wiretap application

and order is "unlawfully intercepted" within the meaning of 18 U.S.C. § 2518(10)(a)(i).

Title III seeks to strike a balance between the mixed advantages and dangers of electronic surveillance. Those same features which make wiretaps so valuable as a weapon against the operations of organized crime also pose a substantial threat to individual privacy. To resolve the "tension between these two stated congressional objectives, . . . the starting point, as in all statutory construction, is the precise wording chosen by Congress in enacting Title III." *United States* v. *Kahn*, 415 U.S. 143, 151 (1974).

The literal language of the identification requirement leaves no question as to when the Government must specifically name the parties. Section 2518 requires that "each application *shall* include . . . the identity of the person, if known, committing the offense, and whose communications are to be intercepted." (Emphasis added.) This requirement is only one of the many specific steps that the Government must follow in order to obtain wiretap authorization, and is a procedural restraint on the use of wiretaps. In our opinion this is not a hollow requirement. It is an important part of the statutory framework that Congress formulated for protection against the dangers of electronic surveillance.

In *United States* v. *Bellosi*, 501 F.2d 833, 837 (D.C. Cir. 1974), the court said:

> "By asking us to refashion another clearly worded provision in Title III in a way that would somewhat ease another of the 'stringent conditions' with which a law enforcement agency must comply before conducting an interception, the Government effectively asks us to do what the *Giordano* Court would not. Section 2518(1) is no less important than Section 2516(1) to Congress' legislative scheme to allow only limited governmental interception of wire or oral communications. Section 2518(1) provides that the judge from whom interception authorization is sought be provided with a detailed and particularized application containing that information which Congress thought necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs. *See* United States v. United States District Court, 407 U.S. 297, 302, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972)."

By requiring the Government to make this disclosure Congress has made it possible for the courts to exercise strict control over communication intercepts. It is apparent that Congress intended § 2518(1) to impose "stringent conditions," thereby playing an integral role in the limitation of wiretap procedures and serving a substantial purpose in the statutory scheme to limit the indiscriminate or otherwise unauthorized use of wiretaps.

When this same provision was construed in *Kahn* the Court stated that "[t]his statutory language would plainly seem to *require* the naming of a specific person in the wiretap application" when the person is known to be committing the offense. 415 U.S. at 152. (Emphasis added.) Although the Court

did not require suppression in that case it was only because Mrs. Kahn was not "known" within the meaning of the provision. There is the clear implication that if she had been "known" suppression would have been required. Later that year, in *United States* v. *Giordano*, *supra*, the Court construed § 2516 (1) of Title III, requiring an Attorney General or a specially designated Assistant Attorney General to authorize the wiretap application. In that case suppression was also required because the mandatory pre-condition "was intended to play a central role in the statutory scheme." 416 U.S. at 528. Although the identity provision in the present case plays a different role in the statutory scheme than the provision in *Giordano*, we are of the opinion that it also plays "a central role."

Since Congress has imposed a clear requirement that the identity of the participants must be disclosed "if known," we are not concerned with the reason that these names were omitted from the application. In our view it makes no difference whether the omission was inadvertent or purposeful. The fact of omission is sufficient to invoke suppression. This omission of Government agents cannot be excused as "a mere technical violation."

We now come to the Government's contention that defendant Buzzacco was not "known" within the meaning of the statute.

The meaning of the term "if known" in 18 U.S.C. § 2518(1)(b)(iv) has been defined by the Supreme Court. In *Kahn*, *supra*, the Court concluded:

> "[T]hat Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought." 415 U.S. at 155.

See United States v. *Martinez*, 498 F.2d 464, 466-67 (6th Cir. 1974).

The District Court found:

> "Special Agent Ault, through a check of Ohio Bell Telephone Company records and execution of physical surveillances, became aware of defendant Buzzacco's identity and address in Niles, Ohio, subsequent to the first set of authorized wire interceptions. Agent Ault further testified that he was aware of Buzzacco's activity and believed he was involved in gambling activities prior to submission of the Affidavit on December 26, 1972."

The following factual background was developed to support these findings. During a ten week period in June and July 1972 ninety-one telephone calls placed by prime suspects in the case were traced to a Youngstown, Ohio, telephone number which was known to be listed under one of Buzzacco's aliases. The FBI knew from previous investigations that Buzzacco had a reputation for being a bookmaker. In the summer or fall of 1972 Buzzacco moved his place of operation to Niles, Ohio. The record is inconclusive as to the date that physical surveillance placed Buzzacco at the Niles address, although it may have been as late as December 29, 1972. Prior

to that time physical surveillance of that address had been conducted. In addition, telephone calls placing lay-off bets were intercepted between the other suspects and a person at the Niles number variously identified as "Buzz" or "Buzzer." At the hearing on the motion to suppress FBI Agent Ault, upon whose affidavit the wiretap orders were based, testified that he had "suspicions" that Buzzacco was involved in the gambling activities prior to the submission of the wiretap applications.

Our prior decisions clearly illustrate that these facts are adequate to demonstrate "a probability of criminal conduct." *Coury* v. *United States*, 426 F.2d 1354, 1356 (6th Cir. 1970). In *Coury* we affirmed a commissioner's finding of probable cause on the strength of an affidavit which stated that the investigating special agent:

> "had personally conducted an investigation of appellant, including surveillance of his home; that he knew appellant to be a bookmaker and a gambler, and knew of his prior conviction for bookmaking activities; also that telephone company records listed calls between appellant and known gamblers in other states. In addition, the Bishop affidavit cited telephone company records showing calls from another well-known gambler to appellant's home," 426 F.2d at 1356.

See also United States v. *Williams*, 459 F.2d 909 (6th Cir. 1972).

We, therefore, hold that at the time the applications for wiretaps were made the Government had probable cause to believe that Buzzacco was engaged

in the illegal gambling activities for which the intercept authorization was sought. He, therefore, should have been named in the application.

We, accordingly, affirm the order of the District Court granting the motions to suppress filed by Donovan, Robbins and Buzzacco.

IV.

Although the defendants Merlo and Lauer were not named in the wiretap application, during the course of the intercepts they were identified as parties to the communications. On February 21, 1973, the District Court ordered the service of inventory notice on 37 persons. After the Government checked its records it was found that two persons had been omitted from the original order. On September 11, 1973, when the District Court was informed of this omission, an amended order directing service of inventory notice was granted as to these two additional parties. Merlo and Lauer's names were never brought to the attention of the court, prior to the first or second order, or at any time thereafter. Consequently they have never been served with inventory notice.

The inventory notice provisions of Title III are set out in 18 U.S.C. § 2518(8)(d) and are quoted above. Since the inventory notice provision does not require on its face that notice must be served in all instances, the case presented by Merlo and Lauer involves a slightly different situation than the identification "if known" provision of Title III discussed previously. If the overheard parties have not been named in the order, as in the present case, "the judge may deter-

mine *in his discretion*" that inventory notice should be served "in the interest of justice." 18 U.S.C. § 2518(8)(d). (Emphasis added.) The judge has no independent information as to the unnamed parties who have been overheard on the intercepts and must depend on the Government to disclose that information in order that he may exercise his discretion.

We agree with the following holding in *United States* v. *Chun*, 503 F.2d 533, 540 (9th Cir. 1974);

> "[A]lthough the judicial officer has the duty to cause the filing of the inventory, it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his § 2518(8)(d) discretion, we also hold that the government is required to furnish such information as is available to it. It is our belief that this allocation of responsibilities between the executive and judicial branches of government will best serve the dual purposes underlying Title III." (Footnote omitted.)

Both Merlo and Lauer were overheard in the authorized interceptions and both subsequently were indicted.[2] The evidence in the intercepts was to be used

[2] This case does not present, and we do not reach, the question of the rights of unindicted persons to receive inventory notice. *See United States* v. *Whitaker*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 953 (1973).

against them. Even though the Government re-examined the records and amended the original inventory notice, Merlo and Lauer never received formal inventory notice. The District Court made a specific finding that "defendants Merlo and Lauer were not served with inventories pursuant to the act *or otherwise notified that they had been intercepted* . . . ." (Emphasis added.)

This finding demonstrates to our satisfaction that the District Court has considered and decided the issue of actual notice. We draw no inference from the fact that notice was given to 39 other persons, many of whom were known to Merlo and Lauer. Others may have communicated the fact of interception to Merlo and Lauer, but this would not necessarily lead them to believe that they had been intercepted. It is just as reasonable to assume that Merlo and Lauer would believe that, since they had not received notice, their conversations were not intercepted.

The only evidence of notice in the record is in response to Merlo's and Lauer's motions for discovery, filed after their indictments and more than a year after the actual interceptions. If these defendants had never been indicted, they might well have never received notice of the interceptions. The Government explains this omission on the basis of "an apparent lack of communication between the FBI and the prosecutor" although the defendants urge that "the government deliberately flouted and denigrated the provisions of Title III by secreting" the defendants' names. For the purpose of this analysis it is un-

necessary to determine which view is correct. Either the Government's deliberate circumvention, *see United States* v. *Eastman*, 465 F.2d 1057 (3d Cir. 1972), or an inadvertant error may require suppression. Although certain cases decided prior to *Giordano* and *Chavez* indicate that, in the absence of actual notice, the prejudice to the defendants is a factor to be considered, *see United States* v. *Cirillo*, 499 F.2d 873, 882-83 (2d Cir. 1974); *United States* v. *Wolk*, 466 F.2d 1143, 1146 (8th Cir. 1972), *Giordano* states that if the provision plays a "central role" that "suppression must follow when it is shown that this statutory requirement has been ignored." 416 U.S. at 529.[3]

Of the recent cases decided by the Supreme Court on the requirements of Title III the present case is most factually similar to *Giordano*. In *Giordano*, as in this case, there was no actual compliance with the statute. The unauthorized approval of wiretap orders, like the failure to serve inventory notice, are both factors which are not susceptible of a showing of prejudice. The factor which distinguishes this case from *Chavez* is that in *Chavez* the statute was in fact followed even though the wiretap orders appeared facially defective. There is no suggestion in the present case that the Government fulfilled its duty under the statute or that there was even a colorable conformity with the statutory requirements. Further, this is not a case where a strict interpretation of the

[3] For a general discussion of 18 U.S.C. §§ 2516 and 2518, *see United States* v. *Wac*, 498 F.2d 1227, 1230-32 (6th Cir. 1974).

statute would render the statute essentially useless for law enforcement purposes as in *United States* v. *Kahn*, 415 U.S. 143, 153 (1974).

From our examination of the legislative history of this provision, *see United States* v. *Chun*, *supra*, 503 F.2d at 537 n. 6, 539-40, 542 n.12, it is our conclusion that this provision plays a central role in the stautory scheme to limit and control electronic surveillance and that it "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." *United States* v. *Giordano*, *supra*, 416 U.S. at 527.

Suppression is required if there is a breach of a Title III provision that "directly and substantially implements" the congressional scheme to limit the use of electronic surveillance. We have determined previously that the Government had a duty to disclose the identity of Merlo and Lauer, and that this duty was breached. It is our view that the inventory notice provisions have a central role in limiting the use of intercept procedures. For these reasons we argee with the District Court that the communications of Merlo and Lauer were "unlawfully intercepted," 18 U.S.C. § 2518 (10)(a)(i), and that suppression is required.

The decision of the District Court is affirmed.

ENGEL, Circuit Judge (concurring in part and dissenting in part). While I agree that the district court properly suppressed the wiretap evidence as to defendants Donovan, Robbins and Buzzacco for the reasons stated in the majority opinion, I respectfully dissent from so much thereof as affirms the suppression of the wiretap evidence against defendants Merlo and Lauer because of violation of 18 U.S.C. § 2518 (8)(d). I would reverse and remand for reconsideration in the light of *United States* v. *Giordano*, 416 U.S. 505 (1974); *United States* v. *Chavez*, 416 U.S. 562 (1974) and certain guidelines which I believe this court should establish in the interpretation of the inventory notice provisions of the statute.

The Factual Background

Merlo and Lauer were not named in the wiretap applications, and their identity was not known at the time application for the interception was made on November 28, 1972, or when a continuation was approved on December 26, 1972. According to the testimony of Special Attorney Edwin J. Gale, twelve telephone conversations placed from the apartment under surveillance and received by Merlo and Lauer were intercepted between December 9, 1972 and January 3, 1973. On January 13, 1973, pursuant to a search warrant, a search was conducted by the FBI of the premises at 21 Olive Street, Akron, Ohio in the presence of both defendants. Evidence was seized as a result of the search and inventories therof were filed and served, at least upon Merlo. Statements

made by Merlo and Lauer at that time indicated that they had answered telephones located in the Olive Street apartment and that Merlo had employed Lauer as a phone man.

The defendants assert in their brief that "the contents of these intercepted communications (phone calls from the telephones under surveillance to Merlo and Lauer) were submitted by the government as probable cause for a search of the defendant's apartment on January 13, 1973." This assertion by defendants is not supported by the record, is denied by the government, and is not a fact found by the trial court. On the contrary, while the activities of Merlo and Lauer were unquestionably known to federal authorities from some time prior to January 13, 1973, the only evidence on the record indicating the date when the conclusion was reached that it was Merlo and Lauer who were parties to the twelve interceptions comes from the testimony of Special Attorney Gale, who placed the time as "late summer of 1973. Perhaps late August."

No inventory notice was ever served on either defendant. A sealed indictment naming both Merlo and Lauer as defendants was filed on November 1, 1973 and was unsealed November 6. On December 17, 1973 transcripts of the twelve interceptions were furnished by the government in response to a request by defendants. On January 17, 1973 District Judge Robert Krupansky suppressed the evidence, and on the following day entered an order severing the trials of Merlo, Lauer and the other appellees herein from

that of the remainder of the defendants, thus paving the way for this interlocutory appeal upon certification by the government pursuant to 18 U.S.C. § 3731.

Suppression Under the Statute

The appeal from the district court's suppression of the wiretap evidence presents the issue of whether failure to serve upon those defendants post-interception inventory notice violates the provision of 18 U.S.C. § 2518(8)(d), and if so, whether the violation requires suppression under 18 U.S.C. § 2518(10)(a). In the words of *United States* v. *Kahn*, 415 U.S. 143 (1974), " . . . . the starting point, as in all statutory construction, is the precise wording chosen by Congress in enacting Title III." 415 U.S. at 151.

Subsection (8)(d) of Section 2518 provides that the issuing judge "shall cause to be served, on the persons named in the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory . . . .". Under the statute, therefore, it was within the discretion of the judge to cause an inventory to be served upon Merlo and Lauer as "such other parties to intercepted communications." Since the judge will have no independent information and must depend upon the government to disclose the names of such other persons, I agree with the majority that the government, therefore, should have a duty on its own initiative to disclose to the judge the names of such persons known to it, even though such duty is not spelled out in the statute.

See *United States* v. *Chun*, 503 F.2d 533, 540 (9th Cir. 1974). I depart from the majority, however, when it holds in effect that a violation of the judicially created duty calls for suppression without regard to whether it was the result of a deliberate flouting of the statute, *United States* v. *Eastman*, 465 F. 2d 1057 (3rd Cir. 1972) or an inadvertent error, *United States* v. *Wolk*, 466 F. 2d 1143 (8th Cir. 1972), or whether there was actual prejudice to the defendants by reason thereof. Such a construction of the statute, in my view, goes well beyond *United States* v. *Chun*, *supra*, runs counter to standards for suppression set forth in *Giordano* and *Chavez*, and is similar to the overly restrictive approach to statuory interpretation which was rejected in *United States* v. *Kahn*, *supra*.

Chavez and *Giordano* set out the standards for suppression under 18 U.S.C § 2518(10)(a)(i). As noted by the court in *Chavez*, *Giordano* "did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful'." *Chavez*, *supra*, at 474, 475. Rather, the court in *Giordano* noted: ". . . Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to *limit the use* of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." (emphasis added) *Giordano*, *supra*, at 527.

In considering whether we should apply the suppression provisions of 18 U.S.C §2518(10)(a)(i) to violations of the post-interception inventory notice provisions of 18 U.S.C. § 2518(8)(d), it is necessary to recognize that since the interception has already occurred, the service of inventory afterward has little, if anything to do with deterring improper initial resort to the procedure. The language " 'unlawfully intercepted' must be 'stretched' " to include failures of conditions subsequent to a valid authorization and execution, *Chun, supra,* at 542, n. 18. It is, therefore, difficult enough for me to conclude that the inventory notice provisions were intended to play a "central role" in "limiting the use of intercept procedures" where the statute specifically requires notice; it is even more difficult where notice is made discretionary and the alleged violation is not even mentioned in the statute. Nevertheless, a judicial interpretation of the statute which imposes a duty on the government to disclose to the judge the names of persons later identified as parties to intercepted communications is reasonable, consistent with the needs of the judge it he is to exercise his statutory discretion and in keeping with the spirit and intent of the Act. 1968 U.S. Cong. and Adm. News 2184. See also Commentary to Standard No. 5.15, tentative draft of American Bar Association Minimum Standards for Criminal Justice for Electronic Surveillance, proposed June 1968, at pages 161-162.

I agree that if the duty created is to have any meaning it is reasonable to attach consequences to its violation which discourage abuse and protect against

resulting injury. I do not agree that the langauge of the statute compels suppression as the invariable judicial vehicle of enforcement. I would limit suppression to those instances in which the government's violation was shown to be deliberate or where, if not deliberate, there is a showing of actual prejudice which cannot be cured by less drastic remedies such as compelling later disclosure or by permitting, in the words of *Chun,* "a reasonable opportunity to prepare an adequate response to the evidence which has been derived from the interception." *Chun, supra,* 503 F.2d at 538.

The facts in this case, and indeed in most reported cases involving widespread organized crime, readily illustrate the complexity of investigations which frequently involve not only different investigative agencies of the federal government, but state law enforcement agencies as well. See e.g., *United States* v. *Cirillo,* 499 F. 2d 871 (2nd Cir. 1974), *cert. denied* 43 U.S.L.W. 3330. The knowledge of one law enforcement officer, or of even a single agency, can rarely be expected to encompass the knowledge of the whole. The identification of parties to telephone conversations by voice is difficult at best. It is infinitely more difficult when the parties are guarded in their remarks, or refer to one another by code name or nickname. Unless the Constitution or the express language of the statute commands otherwise, I believe we are obliged to construe the governmental duty consistently with the dual objectives of the Act:

"To be sure, Congress was concerned with protecting individual privacy when it enacted this statute. But it is also clear that Congress intended to authorize electronic surveillance as a weapon against the operations of organized crime."

(Footnote omitted)

United States v. *Kahn, supra,* at 151

If the foregoing guidelines are applied here, the decision of the district court cannot stand upon the record made and upon the limited findings of the district court.

There is nothing in the record here to suggest that the failure to notify the issuing judge of the names of Merlo and Lauer was anything but inadvertent. Notice was given not only to 37 persons by court order of February 21, 1973, but to two additional persons on September 11, 1973. This itself is a strong indication that the government was not indifferent to its obligations to make later disclosure. No tactical advantage to the government is even suggested in view of the widespread disclosure to others allegedly involved in the conspiracy.

Likewise, I view any possibility of actual prejudice highly doubtful upon the record here. The majority concludes, erroneously I think, that 'this finding demonstrates to our satisfaction that the District Court has considered and decided the issue of actual notice.'" Actually the record shows only that the inventory notice was never sent them, and the district court finding is limited to the observation of "the government's admission that defendants Merlo

and Lauer were not served with inventories pursuant to the Act or otherwise notified that they have been intercepted". I do not conclude from this finding, however, that the district judge found, or the facts revealed, that the defendants had no prior actual knowledge whatever of the interceptions. Thirty-nine of the alleged participants had already been formally notified. Because of the January search of their apartment, Merlo and Lauer already knew in the most concrete terms that their activities, and in particular telephone activities, were under FBI scrutiny. They may not have had direct or indirect notice from the government, but it challenges credulity to conclude therefrom that they did not have some actual knowledge of the interceptions.

The duty to notify Merlo and Lauer arose in late August when, according to Gale, their identity was first known. They were then, in the discretion of the judge, entitled to an inventory, including notice of the facts and dates prescribed in 18 U.S.C. § 2518 (8)(d)(1), (2) and (3). This information does not, however, necessarily include either transcripts of the tapes themselves or even the dates or particulars of individual conversations. As indicated earlier, indictment followed about two months later, and full disclosure of the transcripts themselves some six weeks after that. Further, the defendants were still entitled to protection of the ten-day rule of § 2518 (9). Since this appeal is itself interlocutory, they cannot claim that they have been put to trial without "reasonable opportunity to prepare an adequate re-

sponse". *Chun, supra,* at 538. They are, therefore, in a far more advantageous position than was defendant Venuetucci in *United State* v. *Cirillo, supra.* There Venuetucci did not actually learn of the interceptions of tapes involving his own conversations until the day they were introduced at his trial. The interceptions had been procurred under the New York wiretap law which had been enacted following *Berger* v. *New York,* 388 U.S. 41 (1967). Nevertheless, the Second Circuit, while agreeing with the government should have produced the tapes earlier, found their admission not to be reversible error where failure to make earlier disclosure was the result of oversight, no continuance was sought, and the defendant's claims of actual prejudice bordered on the frivolous. *United States* v. *Cirillo, supra,* at 882-883.

Conclusion

This area of law is both novel and difficult and neither the trial court nor counsel have been furnished with much appellate guidance in working out the very real problems which arise under the statute. For that reason, I would vacate the order suppressing the wiretap evidence relating to Merlo and Lauer, and remand to the district court for reconsideration in the light of the foregoing observations, leaving it to the district judge to determine whether, in connection therewith, any further evidentiary hearing may also be required.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1553

[Filed Mar. 17, 1975, John P. Hehman, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

THOMAS W. DONOVAN, DOMINIC RALPH BUZZACCO, VANIS RAY ROBBINS, JOSEPH FRANCIS MERLO AND JACOB JOSEPH LAUER, DEFENDANTS-APPELLEES

Before: PHILLIPS, Chief Judge, ENGEL, Circuit Judge, and CECIL, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT.

/s/ John P. Hehman
Clerk

A True Copy.
Attest:

_____

John P. Hehman
Clerk

Issued as Mandate:
COSTS: NONE

Filing fee .....$
Printing $
Total $

A TRUE COPY

Attest:

JOHN P. HEHMAN
Clerk

By /s/ Betty Tibbles
Deputy Clerk

[SEAL]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-1553

[Filed Jun. 12, 1975, John P. Hehman, Clerk]

UNITED STATES OF AMERCIA, APPELLANT

v.

THOMAS W. DONOVAN, DOMINIC RALPH BUZZACCO, VANIS RAY ROBBINS, JOSEPH FRANCIS MERLO AND JACOB JOSEPH LAUER, APPELLEES

ORDER DENYING PETITION
FOR REHEARING

Before PHILLIPS, Chief Judge, ENGEL, Circuit Judge, and CECIL, Senior Circuit Judge.

No judge of the court having moved for rehearing in banc, and the petition for rehearing having been considered by the panel, it is ORDERED that the rehearing be and hereby is denied. Judge Engel would grant rehearing as to defendants Merlo and Lauer, for the reasons stated in his dissenting opinion.

Entered by order of the court.

/s/ John P. Hehman
Clerk

A TRUE COPY

Attest:

JOHN P. HEHMAN
Clerk

By /s/ Betty Tibbles
Deputy Clerk

[SEAL]

APPENDIX D

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR73-600

[Filed Jan. 17, 5:48 PM '74, Clerk U.S. District Court, Northern District of Ohio]

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALBERT KOTOCH, ET AL, DEFENDANTS

MEMORANDUM AND ORDER

KRUPANSKY, J.

This criminal proceeding results from a two-count Indictment returned by the Grand Jury charging the seventeen named defendants with a conspiracy and substantive violations of 18 U.S.C. § 1955 in conducting, financing, managing, supervising, directing, and owning all or part of an illegal gambling business involving five or more persons for a period in excess of thirty days and having a gross revenue of $2,000 on one or more single days and in violation of the laws of the State of Ohio.

The defendants have filed various Motions the thrust of each, broadly interpreted, is to suppress the use at trial of certain evidence resulting from electronic surveillance of specific telephone numbers

and articles of physical evidence seized during searches conducted by law enforcement authorities.

During the two days of evidentiary hearings conducted by the Court each defendant was permitted to incorporate and adopt any and all of the legal arguments, testimony and exhibits of the other defendants which could inure to his benefit, thus the consideration of each argument shall, unless otherwise stated, apply to each defendant.

During the investigation of the case, the Government collected extensive information by the use of wiretaps. Defendants assert that:

1. The provisions of Title III of the Omnibus Crime Control Act of 1968 violate the Fourth Amendment guarantee against unreasonable searches and seizures;

2. Insufficient compliance by the Government with the procedural and substantive requirements of 18 U.S.C. §§ 2510-2520, culminated in violations of defendants' Fourth and Fifth Amendment rights.

This Court joins with the majority of courts in holding the provisions of Title III of the Omibus Crime Control Act of 1968 constitutional. The safeguards provided by Title III clearly reflect Congressional effort to comply with the pronouncements of the Supreme Court in *Katz* v. *United States*, 389 U.S. 347 (1967); *Berger* v. *New York*, 388 U.S. 41 (1967); and *Osborn* v. *United States*, 385 U.S. 323 (1967), in order to prevent abuses through electronic

surveillance. *United States* v. *Bobo*, 477 F. 2d 974 (4th Cir. 1973); *United States* v. *Iannelli*, 477 F. 2d 999 (3rd Cir. 1973), U.S. App. pndg.; *United States* v. *Whitaker*, 474 F. 2d 1246 (3rd Cir. 1973), *cert. denied*, 93 S. Ct. 3003 (1973); *United States* v. *Fino*, 478 F. 2d 35 (2nd Cir. 1973), U.S. App. pndg.; *United States* v. *Cafero*, 473 F. 2d 489 (3rd Cir. 1973), U.S. App. pndg.; *United States* v. *Best*, 363 F. Supp. 11 (S.D. Ga. 1973); *United States* v. *Curreri*, 363 F. Supp. 430 (D. Md. 1973), *United States* v. *Bobo*, *supra* at 981 Note 5.

Consideration of defendants' charges challenging the Government's procedural and substantive compliance with statutory mandates dictates a review of the facts and circumstances of the investigation preliminary to the return of the Indictment.

All parties concede that during the morning of November 28, 1972, Steven R. Olah, an attorney assigned to the Strike Force, and Richard L. Ault, Jr., a Special Agent of the FBI, appeared before the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, and presented an Application seeking authorization to intercept wire communications of Albert Kotoch, Joseph Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and other unknown individuals concerning enumerated violations arising pursuant to 18 U.S.C. §§ 371 and 1955 (Defendant Spaganlo's Exhibit A). Attached to the said Application as Order No. 495-72 was a duly executed Temporary Special Designation

of Assistant Attorney General in Charge of the Criminal Division to Authorize Applications for Court Orders Authorizing Interception of Wire or Oral Communications signed by Richard G. Kleindienst, Attorney General, and dated November 8, 1972. The Order was to be effective during the Attorney General's absence from the country from November 12, 1972 to November 26, 1972; a letter dated November 22, 1972, signed by Henry E. Petersen, the Assistant Attorney General, Criminal Division, to William S. Lynch, Chief, Organized Crime and Racketeering Section, authorizing presentment of an Application to a Federal Judge for an Order under 18 U.S.C. § 2518, authorizing the interception of wire communications for a fifteen day period to and from the telephones bearing numbers 216-777-0850 and 216-777-0851 located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and numbers 216-453-6114 and 216-452-1624 located at 204 Broad Avenue, Northwest, Canton, Ohio, in connection with an 18 U.S.C. §§ 371 and 1955 investigation of the hereinbefore listed individuals; a letter of notification signed by William S. Lynch dated November 24, 1972, to David Margolis, Attorney-in-Charge, Cleveland Strike Force, Cleveland, Ohio, advising him of the Attorney General's approval to proceed with the presentation.

Also presented to Judge Battisti in support of the Application was a 46-page Affidavit in which Richard L. Ault, Jr. was the affiant.

Without conflict, the testimony reflects that Judge Battisti carefully examined both the Application and the Affidavit subsequent to which he administered an oath to Steven Olah who thereafter signed the Application. The Judge thereupon duly executed the jurat by affirming Olah's signature at 9:45 a.m.

Judge Battisti administered a separate oath to Special Agent Ault who attested to the truth and accuracy of the facts asserted in the 46-page Affidavit subsequent to which Judge Battisti affixed his signature to the jurat of the Affidavit at 9:50 a.m., an Order Authorizing Interception of Wire Communications at 9:52 a.m., an Order Authorizing the Use of Pen Registers or Touch Tone Decoders at 9:56 a.m., and a Sealing Order at 9:58 a.m.

At the evidentiary hearing of January 14, 1974, it was first discovered that the Affidavit filed and sworn to by Special Agent Ault on November 28, 1972, had not been signed by him during the exchange and execution of the many documents in Judge Battisti's chambers.

In any event, Judge Battisti sealed all of the documents into a manila folder and placed the sealed folder and its contents in his personal office safe. (Battisti's notation and seal—defendant Spaganlo's Exhibit A).

Judge Battisti's Order Authorizing Interception of Wire Communications presumes a preliminary affirmative finding by him of probable cause to believe that a particular offense had been, or was about to be committed; that there was probable cause

for belief that communications concerning the offense would be intercepted; that normal investigative procedures had failed or reasonably appeared likely to fail; and that there was probable cause for belief that the place to be tapped was used in connection with the offense, or was leased to, listed in the name of, or commonly used by, the person or persons involved in the offense. The findings were supported by information reflecting:

1. the identity of the applicant and the person authorizing the Application;

2. a detailed pronouncement of the facts and circumstances relied upon by applicant to justify his belief that the Order should issue, delineating with particularity the type of offense being investigated, a description of the place where the interception was to be made, the type of communications and the identity, if known, of the person or persons committing the offense and whose communications were to be intercepted. *United States* v. *Bynum*, 485 F. 2d 490 (2nd Cir. 1973); *United States* v. *Tortorello*, 480 F. 2d 764 (2nd Cir. 1973), U.S. App. pndg.; *United States* v. *Best*, 363 F. Supp. 11 (S.D. Ga. 1973); *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Md. 1972); *United States* v. *Leta*, 332 F. Supp. 1357 (M.D. Pa. 1971);

3. a complete explanation as to why normal investigative procedures were not being employed.

United States v. *Bobo, supra; United States* v. *Focarile, supra; United States* v. *Falcone*, 364 F. Supp. 877 (D. N.J. 1973); *United States* v. *Bleau*, 363 F. Supp. 438 (D. Md. 1973);

4. the period for which the interception would be required to be maintained; and

5. any history of previous authorization Applications involving the same persons or places involved in the present Application.

Upon review of the pertinent documents contained in defendant Spaganlo's Exhibit A, this Court supports Judge Battisti's initial findings of probable cause and his Order of authorization issued November 28, 1972.

On December 4, 1972, Olah filed a Progress Report which was sealed by Judge Battisti and placed into a manila envelope and thereafter into his office safe. (Defendant Spaganlo's Exhibit B).

On December 8, 1972, Olah filed a second Progress Report which was sealed by Judge Ben C. Green in a manila envelope and placed into Judge Battisti's office safe. (Defendant Spaganlo's Exhibit C).

On December 14, 1972, Judge Battisti signed an Order sealing the recording of the intercept authorized on November 28, 1972, and which was terminated on December 12, 1972, and placed such recording in the protective custody of John T. Burns, Special Agent-in-Charge, FBI, Cleveland, Ohio. This

Order was sealed and placed in the Judge's office safe. (Defendant Spaganlo's Exhibit D).

On December 26, 1972, Olah and Agent Ault appeared before Judge Leroy J. Contie, Jr. and filed an Application for Extension requesting authority to continue interceptions over the telephones numbered 216-777-0850 and 216-777-0851. The Application was signed under oath by Olah and the jurat executed by Justice Contie. Attached to the Affidavit was a letter of authorization signed by Richard G. Kleindienst, Attorney General, dated December 2, 1972, addressed to Henry E. Petersen, Assistant Attorney General, Criminal Division, and a letter from the latter to David Margolis, Attorney-in-Charge, Cleveland Strike Force, Cleveland, Ohio, transmitting the Attorney General's authority to proceed dated December 22, 1972.

Special Agent Ault attested under oath, administered by Judge Contie, and signed two Affidavits filed with the Application.

Upon findings of probable cause, Judge Contie issued an Order Authorizing Continued Interception of Wire Communications, an Order Authorizing the Continued Use of Pen Registers or Touch Tone Decoders, and a Sealing Order.

Upon review of the Application and related documents, this Court concludes a compliance with criteria heretofore discussed and concurs with Judge Contie's findings of probable cause. *United States* v. *Bynum, supra; United States* v. *Bobo, supra; United States* v. *Tortorello, supra; United States* v. *Mainello*, 345 F. Supp. 863 (E.D. N.Y. 1972).

The executed documents were sealed in a manila envelope and retained in Judge Contie's custody. (Defendant Spaganlo's Exhibit E).

At the same time on December 26, 1972, Olah presented to Judge Contie an Application seeking authority to intercept wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others, then unknown to and from the telephone numbered 216-777-3850 located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, subscribed to by Richard Wellman. This application had attached two letters of authorization to proceed from Attorney General Richard G. Kleindienst and Assistant Attorney General Henry E. Petersen. Supporting the Application were two duly executed Affidavits sworn and signed before Judge Contie by Special Agent Ault.

This Court, upon review of the Applications and supporting documents, concurs with Judge Contie's findings of probable cause preliminary to his Order Authorizing Interception of Wire Communications, and Order Authorizing the Use of Pen Registers or Touch Tone Decoders. The documents were sealed in a manila envelope and kept in Judge Contie's custody pursuant to this Order. (Defendant Spaganlo's Exhibit F). *United States* v. *Bynum, supra; United States* v. *Bobo, supra; United States* v. *Tortorello, supra.*

On December 29, 1972, Olah filed a Progress Report with Judge Contie who Ordered it sealed and

retained in his custody. (Defendant Spaganlo's Exhibit G).

On January 5, 1973, Olah filed a second Progress Report with Judge Contie who Ordered it sealed and retained in his custody. (Defendant Spaganlo's Exhibit H). On the same date the Judge Ordered the recordings from the interception which terminated on January 4, 1973, placed in the protective custody of Special Agent-in-Charge, FBI, Cleveland District. This Order was sealed in a manila envelope and retained by Judge Contie. (Defendant Spaganlo's Exhibit I).

On February 21, 1973, Judge Battisti, pursuant to the Government's Application, Ordered the service of inventory resulting from his Order of November 28, 1972, upon the certain designated individuals. (Defendant Spaganlo's Exhibit J). This Order was sealed by Judge Battisti and placed in his office safe.

On April 3, 1973, Olah presented an Application to Judge Battisti pursuant to the written authority of the Attorney General as communicated in writing by the Assistant Attorney General seeking to extend the use of information obtained as a result of the Judge's Order dated November 28, 1972, to other proceedings pursuant to 18 U.S.C. § 2517(5). The Application was attested and subscribed by Olah before Judge Battisti whereupon an Order of Approval was granted, all of which were sealed in a manila envelope and placed in the Judge's office safe. (Defendant Spaganlo's Exhibit K).

On September 11, 1973, Judge Battisti granted the Government's Motion for Amended Order Directing

Service of Inventory which was sealed in a manila envelope retained by the Judge. (Defendant Spaganlo's Exhibit L).

The evidence disclosed that on August 28, 1973, pursuant to an Order signed by Judge Contie, Edwin J. Gale, a Strike Force attorney, obtained all of the documents related to the November 28, 1972, proceedings from Judge Battisti and the documents related to the proceedings of December 26, 1972, before Judge Contie (defendant Spaganlo's Exhibits A, E, and F) took them to the Xerox room where he broke the seal on each of the envelopes and duplicated certain signature pages which were requested by the Department of Justice Washington, D. C. Thereafter, he replaced the documents into their proper envelopes and returned them to Judge Contie, who took Exhibits E and F into his custody, placed Exhibit A and its contents into a larger manila envelope (Government's Exhibit 2 and secured all three envelopes in his desk drawer.

On November 28, 1973, Joseph Benik, the Deputy Clerk of Courts, requested the presence of Gale in the Clerk's Office. After his arrival Judge Battisti's law clerk arrived with between 25 and 40 manila envelopes and Gale was directed by the Deputy Clerk to identify the envelopes related to the case at bar which were authorized to be unsealed by Order of this Court dated November 26, 1973. During this conference, Gale was directed to Judge Contie's chambers where he received a number of manila envelopes including defendant Spaganlo's Exhibits E, F, and J

from the Judge's law clerk all of which he carried to the Clerk's Office where he proceeded to separate and unseal the envelopes at a desk that had been assigned to him by the Deputy Clerk. During the initial examination of the envelopes, it was determined that defendant Spaganlo's Exhibits A, E, F, G, and J were unglued or unsealed. The evidence further disclosed that all documents in each of the unsealed envelopes were intact and in good order. The evidence failed to disclose that either the integrity or confidentiality of any document had been violated, to the contrary, it affirmatively appears that all of the documents here in question were in the possession, custody and control of either Judges Battisti or Contie from the time of their execution until presented in the Clerk's Office on November 28, 1973, with the exception of Exhibits A, E, and F which were unsealed by Gale on August 28, 1973, pursuant to Judge Contie's Order to permit duplication of certain signature pages, and thereafter immediately returned to his custody.

While defendants' Motions can best be considered separately, a review of existing precedent common to all Motions is required for an orderly understanding, consideration and disposition of the contentions advanced.

The gravamen of all Motions is Fourth Amendment infringements evolving from illegal searches and seizures arising from the electronic surveillance initiated on November 28, 1972, and continued and extended thereafter.

The subject of electronic surveillance has been the subject of comment by the Supreme Court in several

landmark cases. Thus, through the explicit language of the Amendment itself and the cases interpreting it, it is commonly accepted that the Fourth Amendment means what it says—unreasonable searches are prohibited. In the same context, the Courts have recognized that the requirements of the Fourth Amendment are not inflexible or obtusely unyielding to the legitimate needs of law enforcement. *Osborn* v. *United States*, 385 U.S. 323, 330 (1967); *Ohio ex rel Eaton* v. *Price*, 364 U.S. 263 (1963) (separate opinion). It is, then, with an eye toward implementing the Fourth Amendment's goal of securing the sanctity of personal privacy and at the same time accommodating the legitimate ends of law enforcement, that the Court must view the challenged provisions of the Omnibus Crime Control Act of 1968 and possible abuses arising thereunder. Thus, in *Berger*, *supra*, the Court considered the constitutionality of a New York permissive eavesdrop statute. Although *Berger* struck down the New York statute, the Court made it explicitly clear that electronic surveillance is permissible when judicially authorizing under the most precise and discriminating circumstances which meet the requirements of the Fourth Amendment. *Osborn*, *supra*. In *Katz*, *supra*, as well as in *Berger*, *supra*, the Supreme Court enumerated certain safeguards without which an authorization for the interception of wire or oral communications may not be valid. Those mandatory requirements demanded:

1. a neutral and detached judicial authority to be interposed between the Government and the public;
2. a showing of probable cause that a particular offense has been or is being committed;
3. the communications, conversations, or discussions sought to be intercepted be described with particularity;
4. the period during which the interception is authorized be specifically limited to insure against a series of intrusions pursuant to a single showing of probable cause;
5. prompt execution of the Order;
6. separate showing of probable cause for extentions or renewals of the Order;
7. a prompt termination of the interception once the conversation sought is seized;
8. a showing of special facts to excuse the lack of notice occasioned by necessary secrecy;
9. a provision providing for a prompt return which must be made describing the seized intercepts.

The purpose of the Crime Control Act was not only to authorize certain limited electronic surveillances, but also to correct and prevent many of its abuses in the sphere of private as well as criminal investigations. *Gelbaro* v. *United States*, 92 S. Ct. 2357 (1972); *United States* v. *Bobo*, *supra*.

A comprehensive examination and analysis of the moving papers including the Application and Affidavit submitted to Judge Battisti on November 28, 1972, and his subsequent Orders issued as a result thereof and the moving papers submitted to Judge Contie including the Applications and Affidavits and the Orders resulting therefrom reflect substantive and procedural compliance with both the Crime Control Act as well as Supreme Court pronouncements. This conclusion results in the face of an awareness by the Court of Special Agent Ault's failure to physically affix his signature to the Affidavit filed with the Application of November 28, 1972, subsequent to attesting to its truth and accuracy under oath administered by Judge Frank J. Battisti.

The object of a signature or mark is to identify the person swearing to the affidavit, it being essential that an affidavit sufficiently identify such individual. Consequently, the practice has long been settled and uniform that an affiant should sign his affidavit. However, it is generally held that in the absence of statute or rule of court to the contrary, a signature is not essential where the identity of the affiant as such is otherwise sufficiently shown, as where he is named in the jurat or where the affidavit commences with his name and where evidence supports the administration of an oath and attestation to the truth and accuracy of the facts alleged in the affidavit.

Title III of the Act and related sections of the United States Code reflect no provision requiring the affixing of signatures to affidavits.

Defined, an "affidavit" is a statement or declaration reduced to writing and sworn to or affirmed before some officer who has authority to administer an oath for affirmation; a statement of fact which is sworn to as the truth. Thus, where, as here, it is affirmatively shown that the truth of the declarations contained in the written document-styled affidavit was sworn to and attested as true before an officer authorized to administer an oath, namely, a judge of the Federal court, defendants' contention that the failure of the affiant to sign the affidavit renders it a nullity is not well taken. 3 Am. Jur. 2d Affidavits §§ 1, 15; 2A C.J.S. Affidavits §§ 2, 28.

Comparative analysis of 18 U.S.C. § 2518(8)(a) and (b) reflects a less demanding compliance with sealing requirements of (b) which attach to the working papers related to this case when compared with the more stringent sealing requirements applying to transcription resulting from the interceptions as provided by (a) of the above section.

Title 18 U.S.C. § 2518(8)(b) provides as follows:

> Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

The apparent purpose of the sealing requirements appear from its legislative history as recognized by

the United States Court of Appeals, Third Circuit, in *United States* v. *Goodwin*, 470 F. 2d 893 (1972), *cert. denied*, 411 969 (1973):

> The section was designed to ensure that the orders and applications are treated confidentially. Moreover, the limitations on disclosure in the last sentence of the section indicate that the congressional concern for confidentiality underlay the section. Since the agent made the application and was privy to the orders and since there is no evidence that he disclosed their content to anyone else after leaving the judge's chambers, his sealing the documents immediately after leaving the chambers would not be a breach of confidence. Nor would his storing the documents violate the statute, since it specifically states that custody shall be wherever the court directs. Thus, when § 2518(8)(b) is read in the light of its legislative purpose, it is apparent that the procedures followed in this case were not erroneous. While it would have been more appropriate, and we recommend it for the future, for the judge rather than the agent to have sealed the documents, his sealing would not have added to the confidentiality of the documents.

As hereinbefore stated the evidence fails to indicate or infer any breach of confidentiality or violation of integrity of any of the working papers here involved. *See also, United States* v. *Iannelli, supra.*

Title 47 U.S.C. § 605 provides in part as follows:

> Except as authorized by chapter 119, T. 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communcations by wire or radio

> shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communication centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena, issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. . . .

Defendants' urge that disclosure of toll call records to the Federal Bureau of Investigation without authority of subpoena or summons constitutes an invasion of privacy prohibited by the Fourth Amendment and *Katz* v. *United States, supra.* While certain broad language in *Katz* may appear to support the defendants' position, this Court upon a more thorough examination of *DiPiazza* v. *United States,* 415 F. 2d 99 (6th Cir. 1969), *cert. denied,* 402 U.S. 949 (1971); and *United States* v. *King,* 335 F. Supp. 523 (S.D. Cal. 1971), rev'd on other grounds 478 F. 2d 494 (9th Cir. 1973), U.S. App. pndg., reconsiders its comment as to the applicability of this authority during the course of the evidentiary hearing and adopts the dictum of *DiPiazza* at pages 103-104 wherein Judge Phillips in delivering the opinion of the Court stated:

> The appellants contend that the toll records could only be obtained under a search warrant,

> citing Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed. 2d 700 (5th Cir.). We find this contention without merit. Katz was an electronic surveillance case in which the Government eavesdropped on telephone conversations. The Court said, "One who occupies [a telephone booth] * * *, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouth piece will not be broadcast to the world." 389 U.S. at 352, 88 S. Ct. at 511. He is not entitled to assume that the fact that he is making a call will be a secret. Similarly one who uses a telephone to make a long distance calls is not entitled to assume that the telephone company will require a warrant before submitting its records in response to an IRS summons.

Accordingly, the Court concludes that a request by an FBI agent for the voluntary production of toll call records constitutes a demand of other lawful authority within the meaning of § 605. *United States* v. *King, supra.*

Accordingly, in considering the joint Motion of Joseph Anthony Spaganlo, Jack Lorenzetti and Michael Malvasi, the Court concludes:

1. Allegation No. 1 is overruled for the reasons hereinbefore set forth at p. 2, ¶ 3;

2. Allegations of unconstitutionality set forth in Allegation No. 2 is overruled and in particular the Court finds as to the following subsections:

   a. The Order for the original wiretap including the Application for an Extension thereof as

well as the Application for Interception of Communications on an additional telephone at the same location and all moving papers related thereto were in substantive and procedural compliance with the requirements of the Act, as well as the pronouncements of the Supreme Court, and no constitutional infringements arose thereunder;

b. Adequate monitoring safeguards were instituted and in effect during the period of interception to insure against interference with personal conversations unrelated to the purpose of the investigation and such monitoring was minimized contrary to the allegations of (b); *United States* v. *Fino, supra; United States* v. *Bynum, supra; United States* v. *Tortorello, supra.*

c. The allegations set forth in Spaganlo's Motion styled (c), (d), (e), (f), (g), (h), (i), (j), & (l) are without merit and are, therefore, overruled:

d. For the reasons hereinbefore set forth, the Court finds as to (k) that the confidentiality and integrity of the moving papers were not violated nor the defendants prejudiced in any way by the broken seals on defendant Spaganlo's Exhibits A, E, F, G, and J;

3. The evidence fails to disclose any misrepresentations of fact made to the Court or contained in any progress report filed with the Court pur-

suant to § 2518(6)(n) with respect to information derived from the original interception and extensions thereof.

The joint Motion of Spaganlo, Lorenzetti and Malvasi is overruled in its entirety.

Upon consideration of the Joint Motion of Harvey Trifler, Ernest Chickeno, George Frank Sidoris, Joseph Slyman, James Neil Girard, Thomas W. Donovan and Albert Kotoch to Controvert Search Warrants, Return Evidence Seized and Suppress Wiretaps, the Court finds that the thrust of the Motion emanates from the Government's alleged failure to conform with the procedural and substantive requirements of both 18 U.S.C. §§ 2510-20 and 47 U.S.C. § 605. The Court having heretofore considered both issues here involved, and absent evidence of impropriety in the execution of the search warrants, the Court finds sufficient evidence of probable cause to support the warrants and the Motion is therefore overruled. Fed. R. Crim. P. 41; *See Spinelli* v. *United States*, 393 U.S. 410 (1968); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Coury* v. *United States*, 426 F. 2d 1354 (6th Cir. 1970).

Considering the separate Motion of James N. Girard for the Return of Seized Property pursuant to Fed. R. Crim. P. 41, the Court finds that the property seized falls within the description of the Warrant and thus the Motion is without merit and is overruled.

Upon consideration of the Motion of defendants Joseph Slyman and James Girard to Suppress Evi-

dence seized on January 13, 1973, at 1814 Saratoga Avenue, Cleveland, Ohio, absent evidence of impropriety in the execution of the search warrants, the Motion is overruled. Fed. R. Crim. P. 41(e).

Regarding the Motion of Vanis Ray Robbins to Suppress and Request for Oral Hearing and Argument, the Court has heretofore determined that the Applications and Orders dated November 28, 1972, complied with all provisions of the Act including 18 U.S.C. § 2516(1) and Supreme Court pronouncements, and thus the first allegation in the Motion is overruled.

Defendant Robbins further alleges that the Application and Order of December 26, 1972, fails to include his name in violation of 18 U.S.C. § 2518(4)(a). The Affidavit of Special Agent Ault submitted on November 28, 1972, clearly reflects the Government's knowledge of phone calls from the phones of identified suspects in the gambling business including numbers 216-777-0850 and 0851 to phones subscribed to or utilized by Robbins, and Robbins' activity in gambling. Furthermore, the additional Affidavit submitted on December 26, 1972, reflects that Robbins was intercepted as a result of the first Order authorizing electronic surveillance. Therefore, the failure to include Robbins in the Applications and Orders of December 26, 1972, as a person known to the Government whose communications are to be intercepted, directly contravenes the mandate of 18 U.S.C. §§ 2518(1)(b)(iv) and 2518(4)(a) and necessitates the suppression of the contents of intercept-

ed communications resulting therefrom and evidence derived therefrom as to this defendant. 18 U.S.C. § 2518(10)(a)(i), (ii). *See, United States* v. *Kahn*, 471 F. 2d 191 (7th Cir. 1972), cert. granted —— U.S. —— (1973).

Accordingly, the contents of any intercepted communications and evidence derived therefrom resulting from the Orders and Applications of December 26, 1972, as to defendant Robbins is hereby suppressed.

Upon consideration of the Oral Motion of Vanis Ray Robbins to Suppress the Search Warrants directed against him and his premises (defendant Robbins' Exhibits P, Q, and R), the Court finds an absence of evidence on the record or on the face of the documents to indicate any improprieties in the execution of the Search Warrants. Accordingly, the Motion is overruled. Fed. R. Crim. P. 41(d).

With regard to the Motion to defendants Louis Glassman and Sanford Glassman to Suppress, said Motion is vague, general, and fails to raise specific issues of fact or law. In view of the Court's comprehensive examination of issues relating to the electronic surveillance and physical searches conducted in this matter as to all defendants, including the Glassmans, the Motion is without merit and is overruled.

Regarding the identical Motions to Suppress of defendants Joseph Francis Merlo and Jacob Joseph Lauer, the Court has heretofore determined that the Applications and Orders dated November 28, 1972, complied with all provisions of the Statute

including 18 U.S.C. § 2516(1), and thus the first allegation in the Motion is overruled. Upon consideration of the second allegation, that the Application and Order of December 26, 1972, failed to name these defendants in violation of 18 U.S.C. § 2518(4)(a), the Court finds insufficient evidence on the record indicating that the Government anticipated interception of their communications, thus this allegation is overruled.

Defendants Merlo and Lauer further charge that they have not been served with notices of inventory with regard to the Applications and Orders of November 28, 1972, and December 26, 1972, pursuant to 18 U.S.C. § 2518(8)(d). Upon consideration of the record, including the comprehensive Orders for inventory contained in Defendants' Exhibits J and L pursuant to which 39 persons were served notices of inventory, and the Government's admission that defendants Merlo and Lauer were not served with inventories pursuant to the Act or otherwise notified that they had been intercepted, the Court finds that in the interests of justice their communications must be suppressed. 18 U.S.C. § 2518(10)(a)(i), (ii); *United States* v. *Whitaker*, 474 F. 2d 1246 (3rd Cir. 1973), *cert. denied*, 93 S. Ct. 3003 (1973); *United States* v. *Eastman*, 465 F. 2d 1057 (3r Cir. 1972).

Accordingly, the contents of all intercepted communications and evidence derived therefrom as to defendants Lauer and Merlo is hereby suppressed.

Upon consideration of the Motion to Suppress of Dominic Ralph Buzzacco, the Court finds:

1. Allegation No. 1 is overruled for the reasons heretofore outlined on p. 18, ¶ 3;

2. Regarding Allegation No. 2 challenging the search of the premises known as 15½ East Park Street, Niles, Ohio:

   a. The Court has found no impropriety in the electronic surveillance under 18 U.S.C. § 2516 (1);

   b. There is sufficient evidence of probable cause to support the warrant. Fed. R. Crim. P. 41;

See, Spinelli, supra; Aguilar, supra; Coury, supra. Accordingly, the Motion is overruled.

Dominic Ralph Buzzacco has orally moved to suppress the contents of wire communications for failure of the Application and Order of December 26, 1972, to include his name in compliance with 18 U.S.C. §§ 2518(1)(b)(iv) and 2518(4)(a). Upon consideration of the Motion, the Court finds that Special Agent Ault, through a check of Ohio Bell Telephone Company records and execution of physical surveilliances, became aware of defendant Buzzacco's identity and address in Niles, Ohio, subsequent to the first set of authorized wire interceptions. Agent Ault further testified that he was aware of Buzzacco's activity and believed he was involved in gambling activities prior to submission of the Affidavit on

December 26, 1972. Therefore, the Motion is granted and the contents of intercepted communications and evidence derived therefrom resulting from the December 26, 1972, Applications and Orders which failed to include Buzzacco are hereby suppressed as to him. 18 U.S.C. § 2518(10)(a)(i), (ii).

Regarding the Motion of James Blank to Suppress Search Warrant for premises at 5303 Northfield Road, Apt. 202, Bedford Heights, Ohio, the Court finds sufficient evidence of probable cause in the Affidavit to support issuance of the Warrant and the Motion is therefore overruled. Fed. R. Crim. P. 41; *See, Spinelli, supra; Aguilar, supra; Coury, supra.*

Upon further consideration of the Joint Supplemental Motions of Harvey Trifler, Ernest Chickeno, George Frank Sidoris, Joseph Slyman, James Neil Girard, Thomas W. Donovan and Albert Kotoch to Suppress and Controvert Search Warrant, the Court finds:

1. Allegation No. 1 is overruled, the Court having previously determined that the Application and Order dated November 28, 1972, complied with 18 U.S.C. § 2516(1);
2. With regard to Allegation No. 2 charging that the Application and Order of December 26, 1972, failed to contain the identity of the persons committing the offense whose communications were to be intercepted, the Court finds that said Application and Order included the

identifies of all such persons known to the Government with the exception of defendant Donovan. The record clearly reflects, and the Government concedes, that Donovan was intercepted during electronic surveillance conducted pursuant to the Order of November 28, 1972, and that as a result the Government became aware of his name and address. Therefore, the failure to include Donovan in the Applications and Orders of December 26, 1972, directly contravenes the mandate of 18 U.S.C. §§ 2518(1)(b)(iv) and 2518(4)(a) and necessitates the suppression of the contents of intercepted communications resulting therefrom and evidence derived therefrom as to this defendant. 18 U.S.C. § 2518(10)(a)(i), (ii).

Accordingly, the contents of intercepted communications resulting from the Applications and Orders of December 26, 1972, and evidence derived therefrom as to Donovan is hereby suppressed. The Joint Supplemental Motions of all other defendants are overruled.

Regarding the oral, Joint Motions of Jack Lorenzetti and Michael Malvasi to Suppress evidence from Search Warrants directed against them, the Court finds sufficient evidence of probable cause in the Affidavits to support issuance of the Warrants and the Motions are therefore overruled. Fed. R. Crim. P. 41; *See, Spinelli, supra; Aguilar, supra; Coury, supra.*

The oral Motion of Harvey Trifler to Suppress on the ground his name was not included in the original inventory Ordered by Judge Battisti on February 21, 1973, is without merit and overruled, in view of the Amended Order Directing Service of Inventory on him, signed by Judge Battisti on September 11, 1973. *See, United States* v. *Cafero,* 473 F. 2d 489 (3rd Cir. 1973), U.S. App. pndg.; *United States* v. *Curreri,* 363 F. Supp. 430 (D. Md. 1973); *United States* v. *LaGorga,* 336 F. Supp. 190 (W.D. Pa. 1971); *United States* v. *Lawson,* 334 F. Supp. 612 (E.D. Pa. 1971).

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

APPENDIX E

18 U.S.C. 2510 *Definitions*

* * * * *

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. 2517 *Authorization for disclosure and use of intercepted wire or oral communications*

* * * * *

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of the communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

* * * * *

18 U.S.C. 2518 *Procedure for interception of wire or oral communications*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such

application. Each application shall include the following information:

* * * * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall au-

tomatically terminate when the described communication has been first obtained.

* * * * *

(8) * * *

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of com-

petent jurisdiction the serving of the inventory required by this subsection may be postponed.

* * * * *

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval. * * *

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No. 75-212

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS W. DONOVAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is to advise the Court of recent developments in two cases cited in the government's petition for a writ of certiorari in this case.

1. In our petition (p. 8, n. 4) we noted that the decision of the Sixth Circuit in this case conflicted with that of a panel of the Fifth Circuit in *United States* v. *Doolittle*, 507 F.2d 1368. However, because *Doolittle* was then pending before the Fifth Circuit on rehearing *en banc*, we did not contend that review by this Court was necessary to resolve an estab-

lished conflict among the circuits. However, on September 2, 1975, the *en banc* Fifth Circuit affirmed the convictions in *Doolittle* on the basis of the panel opinion (see App. A, *infra*). The majority of the panel had originally held (App. B, *infra*), on facts similar to those in the instant case, that a failure to identify known persons in a wire interception application would not result in suppression of evidence where there was substantial compliance with Title III, no prejudice to unnamed persons, and no evidence of government bad faith. Neither the panel nor the court *en banc* discussed the serious practical question of who must be identified in an intercept application. (But see Judge Godbold's dissent, App. A, *infra*, pp. 7a-9a.) Hence, there is now an established conflict in the circuits on the question whether suppression is required for an innocent failure to identify a known person. Moreover, guidance from this Court is still required on the question of the scope of the identification requirement of 18 U.S.C. 2518(1)(b)(iv).

2. We also noted in our petition (p. 8, n. 4) that the government's petition for rehearing with suggestion for rehearing *en banc* was pending in the Court of Appeals for the District of Columbia in *United States* v. *Moore*, 513 F.2d 485, a decision that followed the Fourth Circuit's decision in the related case of *United States* v. *Bernstein*, petition for certiorari pending, No. 74-1486. The government's petition for rehearing was denied on July 28, 1975. However, on September 9, 1975, the court granted the

government's motions to recall and stay reissuance of the mandate pending this Court's disposition of *Bernstein*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 72-3263

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BILLY CECIL DOOLITTLE, WILLIAM AUGUSTUS SANDERS, JR., ERNEST MASSOD UNION, JULIAN WELLS WHITED, FRANK JOSEPH MASTERANA, CLIFF ANDERSON, DARNICE T. MALLOWAY, AND WILLIAM E. BAXTER, DEFENDANTS-APPELLANTS

Sept. 2, 1975

Appeals from the United States District Court for the Middle District of Georgia. William A. Bootle, Judge, 341 F.Supp. 163.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLDMAN, GOLDBERG, AINSWORTH, GODSBOLD, DYER, SIMPSON, CLARK, RONEY and GEE, Circuit Judges.*

PER CURIAM.

The Court voted to reconsider this case *en banc* primarily to determine the correctness of the issue on which the panel divided: whether the failure to name defendants Anderson, Baxter and Sanders in the

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* Circuit Judge Morgan did not participate in the decision of this case.

wiretap interception order required suppression in their trials of intercepted telephone conversations to which they were parties. A majority of the en banc court agrees with the panel's resolution of the issue and the convictions of Anderson, Baxter and Sanders are affirmed on the basis of the panel opinion. *United States* v. *Doolittle*, 507 F.2d 1368 (5th Cir. 1975). Having considered all issues in the case, the Court agrees that the panel correctly decided the issues on which the panel was itself unanimous.

Affirmed.

BROWN, Chief Judge, and WISDOM, THORNBERRY, GOLDBERG and SIMPSON, Circuit Judges, dissent from the affirmance of the convictions of Anderson, Baxter and Sanders, and would reverse for the reasons stated in Judge Thornberry's dissent to the panel decision. 507 F.2d at 1372. *Cf. United States* v. *Bernstein*, 509 F.2d 996 (4th Cir. 1975), *petition for cert. filed*, 43 U.S. L.W. 3637 (U.S. May 27, 1975) (No. 74-1486).

GODBOLD, Circuit Judge (dissenting):

The problem presented is whom must the government name in its applications for wiretap orders under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The pertinent section requires the government to state in its application for a wiretap order "the identity of the person, if known, committing the offense and whose communications are to be intercepted . . .," § 2518(1)

(b)(iv). The court order must state the "identity of the person if known, whose communications are to be intercepted . . .," § 2518(4)(a).[1] Defendants contend that the government must name every person who it has probable cause to believe is committing the crime being investigated. The Fourth and Sixth Circuits have adopted that view. *United States* v. *Bernstein*, 509 F.2d 996 (CA4, 1975); *United States* v. *Donovan*, 513 F.2d 337 (CA6, 1975). The government contends, in effect, that so long as it gives the name of one person with respect to whom it has probable cause it need not reveal the names of others with respect to whom probable cause is also present.

Neither approach to the government's obligation is workable. The defendants' view is too expansive. A single wiretap may produce dozens if not hundreds of names of individuals not seriously under investigation but with respect to whom the existence of probable cause might be found. The probable cause approach would stifle if not smother the law enforcement efforts of government agencies with administrative labors. I think Congress did not intend such a result.

The government's view is too narrow. Congress did not intend to permit the government to name whomever it chooses and no others. The thrust of the wiretap statute is judicial supervision of neces-

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[1] The insignificance of the discrepancy between the language relating to wiretap applications and that relating to wiretap orders is discussed in *United States* v. *Kahn*, 415 U.S. 143, 152, 94 S.Ct. 977, 982, 39 L.Ed.2d 225, 235 (1974).

sary executive invasions of privacy. Such supervision can only serve its function where the supervising court has sufficient access to the information needed for due consideration of wiretap applications. In these *ex parte* proceedings the government is the only source of information. An interpretation that requires the government agency to name only one person when it is actively directing the interception against many more persons reads the naming requirement out of the Act and shifts the locus of informed decision-making from the courts to the agencies. This is contrary to the intent of Congress.

The majority panel decision, adopted by the en banc majority, does not decide whether there was or was not probable cause with respect to Anderson, Baxter and Sanders. Judge Thornberry pointed out in his dissent to the panel opinion that it did not come to grips with this question. Rather, the panel opinion appears to say that, even if there was probable cause with respect to these defendants, the governmental action is nonetheless salvaged by an amalgam of substantial compliance with the statute, no prejudice to the defendants, and no bad faith or subterfuge by the government I have great difficulty with this cure by analgesic balm. The statutory scheme recognizes the privacy interest of one using telephone communications and makes wiretapping a felony except for statutorily prescribed exceptions, 18 U.S.C. § 2511(1). I think none of these grounds is adequate to overcome the policies inhering

in the congressional determination to prohibit and severely punish unauthorized wiretapping, §§ 2511 (1) and 2520.

Construing after-the-fact performance of the requirement of § 2518(8)(d) as substantial compliance misses the thrust of the statute, which is not disclosure to the victim after the fact but review by a federal district judge before the fact. What is missing from the government's proffered compliance is the federal district judge's review of the wiretap plans to protect the privacy interest of the unnamed persons. This is the heart of the statutory scheme. When the person is not named the further disclosure requirements of § 2518(1)(e) are also not triggered and judicial supervision becomes a charade.[2]

Even if that right is discounted, reliance upon after-the-fact compliance with the requirements of § 2518(8)(d) as substantial compliance with the statutory scheme renders the application and order requirements nugatory. If the government need not name a suspect so long as he is given after-the-fact notice and transcripts, then the government need never disclose names in the original application, for it could always give retrospective validity to its actions by sending notice and transcript to whomever it later chooses to prosecute. Without names the

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[2] No court is empowered to consider after the fact whether the wiretap was proper in terms of balancing the conflicting interests of privacy and law enforcement, as the application court is empowered to do under § 2518(4), discussed *infra*. Thus the necessity for proper and informed decision on that question before the fact looms larger in significance.

courts will be seriously disabled in their function of reviewing the applications for probable cause and considering other relevant factors under § 2518(3). The limiting and deterrent features of the statute would be lost. Congress surely did not intend to allow this.

Except to the extent, if at all, that there may be substantial rather than literal compliance with the statute, the statutory scheme does not allow a "no prejudice" or "error without injury" approach. The statute recognizes the right of privacy of one using telephone communications and makes wiretapping a felony except for statutorily prescribed exceptions, 18 U.S.C. §§ 2511(1)(a) and (b) and 2518. One whose privacy has been invaded by an action felonious if not excepted by statute may not be denied suppression on the ground that he really has not been hurt very much.

With respect to good faith, a governmental pure heart does not validate an otherwise invalid wiretap any more than it would a private person's erroneous but good faith belief in the legality of his wiretap of a neighbor or competitor. Even if the government is to be given greater deference, I have difficulty understanding what constitutes good faith in this context.[3] It is obvious that if the government is not required to name a person with respect to whom it has probable cause, then it does not act in bad faith in not naming him. As employed by the majority the phrase "good faith," amorphous and undefined, is not a tool of analysis but merely a palliative. It has no relevance to whether the function of the statute —judicial supervision of executive invasions of individual privacy—has been served.

[3] This is wholly different from the good faith referred to in § 2520, which goes to reliance on a district judge's order, a specific and well-defined concept of good faith unlike that offered by the majority here. Moreover, the good faith there protects government employees from severe after-the-fact sanctions for human errors to which their work particularly exposes them; here it is being used to undercut the before-the-fact protections sought to be provided by the statute. Taken together they empower the very abuses, under color of law and protected from punishment, which this act was designed to prevent.

Since I reject the arguments by which the majority resolve this case, I must consider the question of what triggers the naming requirement of § 2518(1)(b)(iv). Originally I thought that I would join my fellow dissenters, who have taken a stand on *United States* v. *Kahn*, 415 U.S. at 155, 94 S.Ct. at 984, 39 L.Ed.2d at 237, and *United States* v. *Bernstein*, 509 F.2d at 1001-1002.[3a] See the dissent from the panel opinion, 507 F.2d 1368, 1372, 1373, adopted by the en banc minority. On further reflection I have concluded that I cannot join them in that position. At the most *Kahn* only says that if the government does not have probable cause to believe a person is committing the crime being investigated then the government need not name that person under § 2518(1)(b)(iv),[4] 415 U.S. at 155, 94 S.Ct. at 984, 39 L.Ed.

[3a] *See also United States* v. *Donovan*, 513 F.2d at 341.

[4] I think that § 2518(3) poses a distinct naming requirement, *see infra*.

2d at 237. I do not read this to decide the converse proposition that if the government does have probable cause it must name the person. We must then look to the statute to determine whether Congress indicated more definitely whom it wanted named in wiretap applications.

Steering between the Scylla of a stifling administrative burden and the Charybdis of unchecked executive power, I would require the government to name all those individuals "against whom the interception was directed," as that phrase is used in the definition of aggrieved person in § 2510(11).[5] This definition is keyed to the standing and substantive rights given in § 2518(10)(a) and reflecting a congressional concern for protecting the interests of those subjected to government investigations.

I do not see how the naming requirement can be any narrower.[6] As I have already pointed out, to permit the government to conduct an investigation by wiretapping without ever disclosing to a court the persons it hopes to hear and ultimately convict makes mincemeat of the statutory system. This could subject to intentional, repeated, unsupervised and un-

[5] The important details of who must carry exactly what burden of proof must be left to the district courts to work out through practical experience.

[6] Whatever bearing some of the language in *Kahn* may have on this point, I think it is sufficient to say that the individual in that case whose conversation was overheard was not under investigation and that the government made a convincing showing to that effect.

punishable[7] invasions of privacy any person who talks by telephone with persons—only one per wiretap would be necessary under the majority's approach—against whom the government is able to make some showing of probable cause. The essence of the § 2518(1)(e) requirement of disclosure to the application court of prior wiretaps is to prevent such activity. It cannot be prevented unless the government is required to apprise that court of the identity of the persons at whom investigation and wiretap are directed.[8]

If one is to move toward a broader reading of the naming requirement, I see no stopping point short of probable cause. For the reasons noted above I think such a requirement would be too broad because of the administrative burdens it would place on law enforcement agencies.

The approach which I have taken meshes neatly with the application-and-order procedure under which all wiretaps are to be conducted. The statute posits that courts should supervise law enforcement agencies' wiretap activities. Wiretaps are of course a powerful investigative tool, but the concomitant in-

[7] By reason of § 2520.

[8] The target-naming requirement would cut off more severe abuses, by judicial supervision where the persons are named, and by the sanctions of §§ 2511(1) and 2520 where they are not named. The good faith defense provided in § 2520 would be unavailable where the naming requirement is clear and the failure to name is egregious, notwithstanding the presence of a § 2518(3) order.

vasions of privacy necessarily occurring must be weighed against the investigative convenience. The ultimate decision-maker is the federal district court. Judicial supervision of wiretapping begins when a law enforcement agency applies to a court for a wiretap order. Section 2518(1) requires the application to disclose authorization for the application under §§ 2516(1) or (2), the phone to be tapped, the crime believed to be committed, the name of the suspect, a statement that other investigative means have been exhausted or would not be productive, and prior wiretaps of the persons named. The next subsection authorizes the judge to "require the applicant to furnish additional testimony or documentary evidence in support of the application," § 2518(2). The judge who must weigh the competing values of privacy and efficient law enforcement is thus empowered to obtain information pertinent to those factors from the only party before it in these *ex parte* proceedings. The separate authorization of § 2518(2) would be redundant and superfluous if it reached no more than is already covered by § 2518(1)(b), since the judge could always refuse to issue an order until the law enforcement agency had satisfactorily complied with that subsection.

Section 2518(2) is an invitation to the judge receiving the application to plumb the scope and purpose of the government's investigation. It authorizes him to inquire into whatever other purposes the government agency might have, into possible and sus-

pected wrongdoers not yet the subject of probable cause beliefs, and into other collateral matters which, although not required by the bare application requirements of § 2518(1)(b), the court might consider in deciding whether to grant the order.

The judge's duty to weigh these collateral and competing factors is contained in the next subsection, § 2518(3), which does not require, but only authorizes, issuance of a wiretap order after the appropriate findings of probable cause—"the judge *may* enter an ex parte order . . . if the judge determines on the basis of the facts submitted by the applicant that . . . there is probable cause for belief that an individual is committing . . . a particular offense" and that a wiretap will disclose pertinent communications, along with other necessary findings (emphasis added).[9] The judge has discretion not to issue a wiretap order even if he is satisfied that a showing of probable cause has been made. The authorization to require additional information in § 2518(2) read in conjunction with this discretion suggests a broad grant of power to the courts to oversee governmental wiretapping.

In the instant case, I would remand to the District Court for a hearing on whether Anderson, Baxter and Sanders were targets of the government's

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[9] Compare § 2518(10)(a), which refers to a presumption of illegality "if the motion [to suppress] is granted . . ." The conditional "if" here could go to a finding of grounds for suppression, as well as to judicial discretion. But there is no such ambiguity in § 2518(3), which must include discretion.

investigation when the relevant wiretap application was made, that is, whether the wiretaps were directed against them, taking due account of whether the government can reasonably be believed not to be investigating these persons in light of the information it had already collected against them.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 72-3263

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BILLY CECIL DOOLITTLE, WILLIAM AUGUSTUS SANDERS, JR., ERNEST MASSOD UNION, JULIAN WELLS WHITED, FRANK JOSEPH MASTERANA, CLIFF ANDERSON, DARNICE T. MALLOWAY, AND WILLIAM E. BAXTER, DEFENDANTS-APPELLANTS

Feb. 14, 1975

* * * *

Floyd M. Buford, Macon, Ga., for Union and Whited.

Oscar B. Goodman, Las Vegas, Nev., for Doolittle, Sanders and Masterana.

Louis Weiner, Jr., Las Vegas, Nev., Manley F. Brown, Macon, Ga., for Anderson.

Wesley R. Asinof, Atlanta, Ga., for Malloway and Baxter.

William J. Schloth, U.S. Atty., Charles T. Erion, Asst. U.S. Atty., Macon, Ga., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Georgia.

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

RONEY, Circuit Judge:

All defendants were convicted in a non-jury trial for conspiracy to violate 18 U.S.C.A. §§ 1084 and 1952, which prohibit the use of interstate wire and telephone facilities to carry on illegal gambling operations. All defendants were similarly convicted of substantive violation of § 1952, and defendants Masterana and Doolittle were also convicted of substantive violations of § 1084. The convictions were obtained primarily by the use of conversations intercepted by a wiretap authorized by the district court under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-2520, and the fruits of searches for which the wiretap provided probable cause. Recognizing that without this evidence the Government's case would be substantially weakened, if not destroyed, defendants mounted a multi-faceted assault on the wiretap in a motion to suppress the evidence in the district court. The district court denied the motion, and the convictions followed. The attack has been renewed in this Court, but like the district court, we find no infirmity warranting suppression of the evidence and affirm all convictions.

[1] Defendants first attack the wiretap provisions of the Omnibus Crime Control Act as unconstitutional for violations of the First, Fourth, Fifth and Sixth Amendments. We have recently upheld this portion of the statute against a similar constitutional attack. United States v. Sklaroff, 506 F.2d 837 (5th Cir. 1975).

[2] Next the defendants assert that various procedural irregularities in the authorization of the wiretap request within the Justice Department require that the evidence be suppressed. *See* 18 U.S.C.A. § 2515. The Supreme Court of the United States has ruled that irregularities of the kind asserted here do not render the communications "unlawfully intercepted" or the interception request "insufficient on its face." United States v. Chavez, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380 (1974); *see* 18 U.S.C.A. §§ 2518(10)(a)(i), 2518(10)(a)(ii). At the time this case was argued, the Supreme Court had not decided *Chavez* and appellants relied on the Ninth Circuit decision in that case. United States v. Chavez, 478 F.2d 512 (9th Cir. 1973). The Supreme Court modified that portion of the Ninth Circuit decision upon which the appellants relied. We find nothing in this case to warrant a different result than that determined by the Supreme Court in *Chavez*. Considering the other information contained in the Interception Order Authorization, such as the location of the phones to be tapped, address of the Sportsman's Club, and its owner, we find the one incorrect digit in one of the four telephone numbers listed therein to be an immaterial variation from the actual, correct number for which the tap was requested of the district court. *Cf.* United States v. Chavez, *supra*.

[3] The procedure of filing the affidavits of the Attorney General and his subordinates, as a method of proving the administrative history of the specific

authorization in this case, is identical to that used in *Chavez*. There is no constitutional infirmity in the district court's refusal to require more of the Attorney General on this narrow issue of fact.

[4] Appellants contend that the use of a "pen register," as in this case, is not specifically authorized by Title III and must, therefore, be considered rejected by Congress as an appropriate investigative tool. The Act does not prohibit the use of pen registers and we do not view its use in this case, based upon probable cause and with a separate authorization from the district court, as being constitutionally offensive. *See* United States v. Giordano, 416 U.S. 505, 553-554, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) (Powell, joined by the Chief Justice, and Blackmun and Rehnquist, JJ., concurring in part and dissenting in part); United States v. Finn, 502 F.2d 938 (7th Cir. 1974); United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974); *cf.* United States v. Falcone, 364 F.Supp. 877 (D.N. J. 1973), aff'd, 500 F.2d 1401 (3rd Cir. 1974).

[5, 6] Certain defendants assert that the Government lacked probable cause to believe that their conversations would be intercepted by the wiretap. They contend that this lack of probable cause should render the tap unlawful as to them. A similar argument has been rejected by the Supreme Court in United States v. Kahn, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). At oral argument, the appellants relied upon the Seventh Circuit decision in United States v. Kahn, 471 F.2d 191 (7th Cir.

1972). The reversal by the Supreme Court of the Seventh Circuit decision is dispositive of the issue as framed here. The statute does not require that there be probable cause as to all persons whose conversations are intercepted. *See* 18 U.S.C.A. § 2518 (1)(b)(iv). Since the wiretap in this case was validly issued, the wiretap conversations of those individuals not known to be involved in criminal activity at the time of the court authorization may be used against them.

[7] The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in *Kahn*, they argue that, not being "unknown," they should have been named in the authorization. They contend that since they were not named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity only of Doolittle, the co-owner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent. All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes

and received transcripts of the conversations prior to use against them at trial, as if they had been named in the order. Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretap application. The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to them inadmissible under 18 U.S.C.A. § 2518(10)(a).

[8] The last general attack by all defendants is that the wiretaps exceeded the scope of the interceptions authorized by the court order. The testimony by the monitoring agent at the suppression hearing reveals that they listened to each call only long enough to determine whether in their judgment it could be one dealing with gambling as authorized to be intercepted by the district court. Only those calls which the agents reasonably believed were related to gambling were recorded on tape. There is no question that some irrelevant and personal portions of gambling conversations were intercepted or that certain nonpertinent conversations were intercepted. But this is inherent in the type of interception authorized by Title III, and we do not view the simple inclusion of such conversations, without more, as vitiating an otherwise valid wiretap. The procedure testified to by the agents appears a reasonable method for complying with the order of the district court, in accord with the statutory mandate that the interception be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Title III. United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918, 94 S.Ct. 2623, 41 L.Ed.2d 223 (1974).

[9] The district court specifically found that defendants Malloway and Baxter lacked actual knowledge of the use of interstate facilities in the gambling operation. This lack of specific knowledge is legally irrelevant. The words of § 1952 do not require specific knowledge of the use of interstate facilities and we agree with the decisions in other Circuits that such knowledge is not a prerequisite to criminal liability thereunder. *See, e. g.*, United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971); United States v. Hanon, 428 F.2d 101 (8th Cir. 1970), cert. denied, 402 U.S. 952, 91 S.Ct. 1608, 29 L.Ed.2d 122 (1971); United States v. Miller, 379 F.2d 483 (7th Cir.), cert. denied, 389 U.S. 930, 88 S.Ct. 291, 19 L.Ed.2d 281 (1967).

[10] Anderson individually challenges the district court's handling of his evidentiary objection to certain of the intercepted conversations as hearsay. The trial court's rulings on this matter shows a clear understanding of the law on the exception to the hearsay rule which applies to statements made by co-conspirators in furtherance of the conspiracy. *See,*

e. g., United States v. Register, 496 F.2d 1072, 1078-1079 (5th Cir. 1974); United States v. Williamson, 482 F.2d 508, 513 (5th Cir. 1973). An examination of the record shows sufficient independent evidence of the existence of a conspiracy to which Anderson was a party to warrant the introduction of the hearsay conversations against him.

Affirmed.

THORNBERRY, Circuit Judge (concurring in part and dissenting in part):

I concur in the decision affirming the convictions of Doolittle, Malloway, and Masterana. With regard to appellants Anderson, Baxter, and Sanders, however, I would reverse; hence I respectfully dissent from so much of the majority opinion as affirms their convictions.

I do so not without reluctance, for the majority admirably attempts to demonstrate that the latter defendants were not prejudiced by the procedure under which their intercepted telephone communications were used against them at trial. That is while these defendants enjoyed along with every member of the public a Congressionally-recognized interest in individual privacy, their interest must be balanced against the government's interest in enforcing laws relating to the crimes enumerated in 18 U.S.C. § 2516(1)(a)-(g). Under the circumstances of this case, these defendants having obtained inventories

and access to the evidence, the majority necessarily reasons that the governmental interest must prevail.

If the choice were ours to make, I probably would not quarrel with the majority's conclusions that "there was substantial compliance with the requirements of [Title III]," and, consequently, no requirement of suppression as to Anderson, Baxter, and Sanders due to the failure of the government and the district court to name them in either the wiretap application or the resulting order. The controlling issue of statutory construction, however—an issue with which the majority does not come to grips—has already been decided rather clearly by the Supreme Court. It is in the application of the Court's rule of statutory construction[1] to the facts that I find myself in basic disagreement with the majority.

In United States v. Kahn, 415 U.S. 143, 155, 94 S.Ct. 977, 984, 39 L.Ed.2d 225, 237 (1974), the square holding is as follows:

> We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe

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[1] The pertinent provisions of 18 U.S.C. § 2518 are:

(1) (b) (iv)—"Each application shall include the following information: . . . the identity of the person, if known, committing the offense and whose communications are to be intercepted. . . ."

(4) (a)—"Each order authorizing or approving the interception of any wire or oral communication shall specify—the identity of the person, if known, whose communications are to be intercepted . . ."

> that the individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons "as yet unknown" covered by Judge Campbell's order.

Having so held, the Court proceeded to reverse the Seventh Circuit, which had ordered Minnie Kahn's gambling-related telephone conversations suppressed, albeit for reasons more onerous to the government than the test announced by the Supreme Court.

Perhaps apprehensive about its quick dismissal of *Kahn* in this case, the majority somehow divines a contention by the government that probable cause to suspect participation "in the gambling business" existed only as to Doolittle at the time when wiretap authorization was sought. The majority suggests that this absence of probable cause as to the "others as yet unknown" may have resulted from government possession of mere hearsay information, rather than personal observation by investigating agents, concerning the behavior of these "others." Such a dichotomy, if seriously advanced, could indeed effect a major formulation of the law of probable cause. *See* Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Draper v. United States, 358 U.S. 307, 311, 79 S.Ct. 329, 332, 3 L.Ed.2d 327, 331 (1959); Gonzales v.

Beto, 5th Cir. 1970, 425 F.2d 963, 968-970, cert. denied, 400 U.S. 928, 91 S.Ct. 194, 27 L.Ed.2d 189 (1970). Nor do I understand the majority to suggest that "probable cause" as to a given individual or telephone number connotes a more demanding standard when wiretaps are used by contrast to other types of searches. Again such a suggestion would, in my view, be erroneous. *See* United States v. Falcone, 3rd Cir. 1974, 505 F.2d 478, 481, United States v. Finn, 7th Cir. 1974, 502 F.2d 938, 941. The question with which I shall attempt to deal, then, is whether at the time when wiretap authorization was sought, the government had probable cause to suspect that Anderson, Baxter, and Sanders were conspiring with or assisting Doolittle in illegal gambling involving the use of the telephone at the Sportman's Club. For reference, reproduced in the margin [2] are the

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[2]

APPLICATION

(Number and Title Omitted)

Charles T. Erion, an Assistant United States Attorney, Middle District of Georgia, being duly sworn states:

This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, United States Department of Justice, Washington, D. C., together with Agents of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is—he is an attorney authorized by law to prosecute or participate in the prosecution

of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant to make this application for an order authorizing the interception of wire comcunications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

[516] 3. This application seeks authorization to intercept wire communications of Billy Cecil Doolittle and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is—offenses involving the transmission, by means of an interstate wire facility, of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States Code, Section 1084, and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and a conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code, which have been committed and are being committed by Billy Cecil Doolittle and others as yet unknown.

4. He has discussed all the circumstances of the above offenses with Special Agent Gary W. Hart of the Macon, Georgia office of the Federal Bureau of Investigation who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Hart (attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Billy Cecil Doolittle and others as yet unknown have committed and are committing offenses involving the transmission, by means of an interstate wire facility, of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States

Code, Section 1084, and the use of interstate [517] telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and are conspiring to commit such effenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications of Billy Cecil Doolittle and others as yet unknown concerning these offenses will be obtained through the interception, authorization for which is herewith applied for. In particular, these wire communications will concern the interstate transmission of gambling information relating the outcome of professional baseball games and the dissemination of such information to persons engaged in the unlawful business of gambling, and the participants in the commission of said offenses.

(c) normal investigative procedures reasonably appear appear to be unlikely to succeed and are too dangerous to be used.

(d) there is probable cause to believe that the telephones listed to the Sportsman's Club located in the premises of the Sportsman's Club, 222 Third Street, Macon, Georgia, and carrying telephone numbers 912-746-9110, 912-745-2843, 912-745-2844, and 912-745-2845 have been used and are being used by Billy Cecil Doolittle and others as yet unknown [518] in connection with the commission of the above-described offenses.

5. No previous application has been made to any Judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities, or places specified herein.

WHEREFORE, your affiant believes that probable cause exists to believe that Billy Cecil Doolittle and others as yet unknown are engaged in the commission of offenses involving the transmission of gambling and wagering information by means of an interstate wire facility, by a person engaged in the business of gambling and the use of interstate telephone communication facilities for the transmission of betting infor-

mation in aid of a racketeering enterprise (gambling), and a conspiracy to do so; that Billy Cecil Doolittle and others as yet unknown have used, and are using the telephone listed to the Sportsman's Club, located at 222 Third Street, Macon, Georgia, and bearing numbers 912-746-9110, 912-745-2843, 912-745-2844, and 912-745-2845, in connection with the commission of the above-described offenses; that communications of Billy Cecil Doolittle and others as yet unknown concerning these offenses will be intercepted to and from the above-described telephone; and that normal investigative procedures appear unlikely to succeed and are too dangerous to be used.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Hart, which is attached hereto and made a part hereof, affiant requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation of the United States Department of Justice to intercept wire communications to and from the above-described telephones until [519] communications are intercepted which reveal the manner in which Billy Cecil Doolittle and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), and which reveal the identies of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of that order, whichever is earlier.

/s/ Charles T. Erion
CHARLES T. ERION
Assistant United States
Attorney
Middle District of Georgia

Subscribed and sworn to before me this 21 day of August, 1970.

/s/ W. A. Bootle
United States District Judge

[Footnote continued on page 27a]

[2] [Continued]

AFFIDAVIT OF GARY W. HART

Gary W. Hart, Special Agent, Federal Bureau of Investigation, Macon, Georgia, being duly sworn, states:

1. I am an "investigative or law enforcement officer of the United States" within the meaning of Section 2510(7) of Title 18, United States Code—that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

2. I have conducted an investigation of the offenses of Billy Cecil Doolittle and, as a result of my personal participation in that investigation and of reports made to me by other agents, I am familiar with all the circumstances of the offenses.

3. A confidential informant who has admitted personal participation in gambling activities, has stated that Doolittle operates a bookmaking operation in the Sportsman's Club, located at 222 Third Street, Macon, Georgia. Doolittle is assisted in his bookmaking operation by Will Sanders who is a full partner. Doolittle obtains the "line" for professional baseball games from an unknown individual by placing a call from a pay telephone booth located in the poolroom of the Sportsman's Club at approximately noon each day, and Doolittle and Sanders thereafter disseminate the "line," accept wagers on professional baseball games, and "lay off" bets through use of several telephones, one of which is numbered 745-2844, located in the "members only" room of the Sportsman's Club which is adjacent to the pool room. Among individuals contacted by Doolittle and his associates in this manner are Cliff Anderson of Columbus, Georgia, and Billy Baxter of Augusta, Georgia.

I have established through independent investigation that this informant has had the opportunity to obtain first-hand knowledge of the activities the informant has described. This informant has been contacted by Special Agents of the Federal Bureau of Investigation [521] on several occasions since January 1970 and on four occasions the informant has furnished information which has been determined to be accurate by independent investigation. On a date during the week

beginning on August 2, 1970, this informant stated that within five (5) days prior to that date through personal observation of Doolittle's activities in the Sportsman's Club, the informant determined that Doolittle is currently operating as described in the preceding paragraph. This informant further stated that through first-hand knowledge the informant knows that Anderson and Baxter are engaged in accepting wagers on the outcome of professional baseball games as of a date during the week beginning on August 2, 1970.

4. A second confidential informant who has admitted personal participation in gambling activities has also stated that Doolittle operates a bookmaking operation in the Sportsman's Club located at 222 Third Street, Macon, Georgia, in a room off the pool hall area of the building. Further, informant states that during the 1970 professional baseball season, Doolittle, assisted by Will Sanders who is a partner, has utilized telephones, one of which is numbered 745-2844, located in this room to facilitate the placing and acceptance of wagers based upon the outcome of professional baseball games. Doolittle is associated with Cliff Anderson of Columbus, Georgia, and Billy Baxter of Augusta, Georgia, and he participates with these individuals, and others unknown, in the placing and accepting of wagers based upon the outcome of professional baseball games. Doolittle is associated with Cliff Anderson games by placing a call from a pay telephone booth located in the Sportsman's Club at approximately noon each day, and subsequently supplies this line to the aforementioned to assist them in the placing and acceptance of wagers based on the outcome of professional baseball games.

[522] I have established through independent investigation that this informant has had the opportunity to obtain first-hand knowledge of the activities the informant has described. This informant has been contacted by Special Agents of the Federal Bureau of Investigation on several occasions since January 1970 and on 22 occasions the informant has furnished information which has been determined to be accurate by independent investigation. On a date during the week beginning on August 9, 1970, this informant stated that within five (5) days prior to that date, through personal conversation with one of the principals at the Sportsman's Club, the

government's wiretap application and supporting affidavit of Special Agent Gary W. Hart, insofar as these materials are illuminative of the question at hand.

Among the features of these materials which convince me that law enforcement officers had probable cause as to Anderson, Baxter, and Sanders are the following: (a) The basis of the application was Hart's affidavit. Repeatedly Hart explicitly refers to a telephone wagering operation conducted over the Sportsman's Club telephone by Doolittle, Anderson, Baxter, and Sanders. (b) Hart avers that these ac-

informant determined that Doolittle is currently operating as described in the preceding paragraph. This informant further stated that through first-hand knowledge the informant knows that Anderson and Baxter are engaged in accepting wagers on the outcome of professional baseball games as of a date during the week beginning on August 9, 1970.

* * * *

6. Examination of the records of the Macon, Georgia, Credit Bureau on April 27, 1970, disclosed that Doolittle and William A. Sanders, Jr., are listed as owners of the Sportsman's Club, Macon, Georgia. Sanders was also listed as a former employee of the Southern Bell Telephone Company for 13 years.

* * * *

/s/ Gary W. Hart
Special Agent
Federal Bureau of
Investigation

Subscribed and sworn before me this 21 day of August, 1970

/s/ W. A. Bottle
United States District Judge

tivities were reported to him by confidential informants, alleged upon Hart's oath to have made declarations against penal interest as indicia of reliability, one of whom is further alleged to have given reliable information on twenty-two prior occasions. (c) The information is quite specific with respect to the players, their roles, certain wagered athletic contests, and the physical setting. (d) Hart avers that this specificity is the product of personal knowledge on the part of the informants, whose personal knowledge Hart swears he has verified through "independent investigation." Without belaboring the point, I simply confess my bemusement that if the Hart affidavit did not provide probable cause as to Anderson, Baxter, and Sanders, I do not know what would. *See* Gonzales v. Beto, *supra*, 425 F.2d at 968-969; *see also* Polanco v. Estelle, 5th Cir. 1975, 507 F.2d 81 ("in judging probable cause magistrates are not to be confined by restrictions on their use of common sense"); United States v. James, 9th Cir. 1974, 494 F.2d 1007; United States v. McHale, 7th Cir. 1974, 495 F.2d 15. Yet, for reasons not entirely apparent to this court, the government saw to it that neither the application nor the order made reference to any of these three defendants.[3]

The government's own statements shed additional light on the issue. When this appeal was briefed, the Supreme Court had not yet decided *Kahn*. At

[3] The district court, in drawing the wiretap order, simply adopted the "others as yet unknown" language used by the government in its application.

that time the government's position was that the term "person, if known," as used in § 2518(1)(b)(iv) and 4(a), meant only the "subject" of the interception, whom the government contended was Doolittle. Not anticipating that the Supreme Court would choose a middle ground between its argument and the "discoverability" test successfully advanced by Minnie Kahn in the Seventh Circuit, the government stated in its brief to this court:

> The application in the present case demonstrated that agents of the government actually "knew," that is had personal knowledge as opposed to information, of only one defendant who was using the phones in question: defendant Doolittle, the person named in the order. They and the Court had nothing more than "probable cause to believe" that Anderson and Baxter [and Sanders] would be intercepted.[4]

Or, I would add, that these three were "committing the offense" for which the wiretap was sought.

Thus, the majority manufactures for the government a result which reflects considerable profit from inconsistent positions, while purging the government's contention of any adverse consequences, however logical or proper they may be. Appellant Anderson argues that in this respect—the government should now be estopped. There may be merit to Anderson's argument, inasmuch as the government was equally as capable as appellants to anticipate what the Supreme Court would hold in *Kahn*. I

[4] Brief for the government at 28-29.

need not rest my views on estoppel, however, since I have already concluded that the requisite probable cause existed as to Anderson, Baxter, and Sanders at the time when tap authorization was sought. Under *Kahn*, therefore, I would reverse as to these three with directions to the district court to suppress their intercepted communications pursuant to 18 U.S.C. § 2518(10)(a)(ii) ("order of authorization or approval under which it was intercepted is insufficient on its face").[5]

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[5] Although the majority does not make this argument in support of its conclusion that Title III was substantially complied with, one might contend that paragraph 4 of the wiretap application, which purports to incorporate the Hart affidavit by reference, operated in legal usage to name Anderson, Baxter, and Sanders insofar as § 2518(1)(b)(iv) required that they be named in the application. One might then argue that since neither the application, the supporting affidavit, nor the order in *Kahn* mentioned Minnie Kahn, and that since the Supreme Court phrased its holding disjunctively in terms of naming a person in the application *or* interception order, the Court implied thereby that the naming of probable cause suspects in *either* the application or the order would satisfy the statute. I may assume that the incorporation by reference operated to name Anderson, Baxter, and Sanders in the application, but I reject the idea that *Kahn* supports or implies the rest of the argument. First, the significant feature of *Kahn* is its emphasis on the literal language and terms of Title III. In addition to requiring, under *Kahn*, the naming of probable cause suspects in the application, Title III literally requires that they also be named in the order. § 2518(4)(a). That was not done in this case, and *Kahn*—inasmuch as it involved no question of half-compliance, through incorporation by reference or otherwise—cannot be deemed to support an analysis which runs counter to the statute's literal provisions. Second, although *Kahn* holds that the district court's duty to include names in the order is no broader than the

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government's duty to include them in the application, the Court explicitly recognized that "[s]ection 2518(4)(a) requires that the order specify 'the identity of the person, if known, whose communications are to be intercepted.'" 415 U.S. at 151, 94 S.Ct. at 982, 39 L.Ed.2d at 234. This part of the Court's discussion does strongly imply a responsibility on the government to see that the names of its probable cause suspects are placed in the court's order—the operative document for initiating a lawful wiretap—as well as the application. This responsibility arises because "the judge who prepares the order can only be expected to learn of the target individual's identity through reference to the original application . . ." *Id.*

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APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-212

UNITED STATES OF AMERICA,
Petitioner

—v.—

THOMAS W. DONOVAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 8, 1975
CERTIORARI GRANTED FEBRUARY 23, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-212

UNITED STATES OF AMERICA,

Petitioner

—v.—

THOMAS W. DONOVAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TABLE OF CONTENTS

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CR 73-600

JUDGE KRUPANSKY

DOCKET ENTRIES

DATE	PROCEEDINGS
11/1/73	Indictment filed.
11/1/73	Seventeen praecipes for warrants of arrest re: all defts filed. It is so ordered. Thomas, J. Warrants issued, Bonds set on all Warrants for $1,000.00. surety.
11/5/73	Eight appearance bonds for $1,000.00. surety re: Michael Malvasi, Harvey Trifler, Joseph Anthony Spaganlo, James Blank, Albert Kotoch, George Frank Sidoris, & Ernest Chickeno (Peerless Ins. Co.) filed.
11/5/73	Two appearance bonds for $1,000.00. surety, re: Sanford Glassman & Louis Glassman filed. (Allegheny Mutual Casualty Co.)
11/6/73	Affidavit of Paul R. Corradini filed.
11/6/73	Order to unseal and place indictment on the Docket filed. Krupansky, J. copies U.S. Atty., U.S. Marshal & Dept. of Justice, Organized Crime & Racketeering Section.
11/8/73	Appearance bond re: Vanis Ray Robbins filed. $1,000.00. surety (Summit Insurance Co. of N.Y.)
*11/7/73	Appearance bond re: Thomas Wm. Donovan filed. $1,000.00. surety (Midland Mutual Ins. Co.)

DATE	PROCEEDINGS

11/21/73 Ten Warrants of Arrest retn & filed. Re: Albert Kotoch, Michael Malvasi, Ernest Chickeno, Jack Lorenzetti, James Blank, Louis Glassman George Frank Sidoris, Sanford Glassman, & Joseph Anthony Spaganlo executed 11/5/73. & Harvey Trifler, executed 11/5/73

11/12/73 Order re: pre-trial schedule filed. Krupansky, J.—Defts granted until 12/1/73 to file any & all motions; Govt granted until 12/14/73 to respond trial set for 1/14/74; no extensions of time or continuances will be granted.—copies to counsel (Noted 11/13/73)

11/16/73 Minutes of proceedings filed. RE: ALBERT KOTOCH, Streepy, Mag., Czompoly, r. (deft. arraigned, plea of not guilty entered. Bond continued Pre-tria order of 11/12/73 given to atty. Isaac)

11/16/73 Minutes of proceedings filed. RE: JOSEPH ANTHONY SPAGANLO, Streepy, Mag., Czompoly, r. (deft. arraigned, plea of not guilty entered. Bond continued. P.T. order of 11/12/73 to Rotatori)

11/16/73 Minutes of proceedings filed. RE: HARVEY TRIFLER, Streepy, Mag., Czompoly r. (deft. arraigned, plea of not guilty entered. Bond continued. PT order of 11/12/73 to Giuliani)

11/16/73 Minutes of proceedings filed. RE: ERNEST CHICKENO, Streepy, Mag., Czompoly r. (deft. arraigned, plea of not guilty entered. Bond continued.)

11/16/73 Minutes of proceedings filed. RE: JOSEPH SLYMAN, Streepy, Mag., Czompoly, r. (deft. arraigned, plea of not guilty entered. Bond continued. Copy of PT Order of 11/12/73 to Atty. Sperli)

11/16/73 Minutes of proceedings filed. RE: JAMES NEIL GIRARD, Streepy, Mag., Czompoly, r. (deft. arraigned, plea of not guilty entered. Bond continued.)

11/16/73 Minutes of proceedings filed. RE: GEORGE FRANK SIDORIS, Streepy, Mag., Czompoly, r. (deft. arraigned, plea of not guilty entered. Bond continued

DATE	PROCEEDINGS

11/16/73 Minutes of proceedings filed. RE: LOUIS GLASSMAN, Streepy, Mag., Czompoly r. (deft. arraigned, plea of not guilty entered. Bond continued. Copy of P. T. Order of 11/12/73 previously mailed to atty. Dubyak)

11/16/73 Minutes of proceedings filed. RE: SANFORD GLASSMAN, Streepy, Mag., Czompoly, r. (deft. arraigned, plea of not guilty entered. Bond continued

11/16/73 Minutes of proceedings filed. RE: DOMINIC RALPH BUZZACCO, Streepy, Mag., Czompoly, r. (deft. arraigned, plea of not guilty entered. Bond continued PT order of 11/12 given to atty. Policy.)

11/16/73 Minutes of proceedings filed. RE: JACK LORENZETTI, Streepy, Mag., Czompoly, r. (deft. arraigned, plea of not guilty entered. Bond continued

11/16/73 Minutes of proceedings filed. RE: VANIS RAY ROBBINS, Streepy, Mag., Czompoly, r. (deft. arraigned. plea of not guilty entered. Bond continued

11/16/73 Minutes of proceedings filed. RE: JAMES BLANK, Streepy, Mag., Czompoly, r (deft. arraigned, plea of not guilty entered. Bond contined.)

11/23/73 Motion of U.S.A. to unseal documents concerning the interception of wire communications filed.

11/26/73 Order that all orders, applications, affidavits, progress reports, motion and inventories referred to in par. 1 through 8 be unsealed in order that they may be inspected and copies by the defts and their counsel, etc. fil (11/26/73) Krupansky, J. Copies mailed 11/26/73.

11/26/73 Minutes of proceedings filed. Steepy, Mag., Parise, r. RE: MICHAEL MALVASI (Deft. arraigned, plea of not guilty entered. Bond continued)

11/26/73 Minutes of proceedings filed. Streepy, Mag., Parise, r. RE: THOMAS DONOVAN (deft. arraigned, plea of not guilty entered. Bond continued)

DATE	PROCEEDINGS

11/26/73 Minutes of proceedings filed. Streepy, Mag., Parise, r. RE: Jacob Laner (deft. arraigned, plea of not guilty entered. Bond continued)

11/26/73 Minutes of proceedings filed. Streepy, Mag., Parise, R. RE: JOSEPH MERLO (deft. arraigned, plea of not guilty entered. Bond continued)

11/29/73 Motion of pltf. to supress Search Warrant filed. Copy mailed 11/29/73.

11/29/73 Motion of deft., Albert Kotoch, for bill of particulars filed. Copy mailed 11/29/73.

11/30/73 Motion of deft., MERLO for bill of particulars filed. Copy mailed 11/30/73.

11/30/73 Motion of deft. LAUER for bill of particulars filed. Copy mailed 11/30/73.

11/30/73 Motion to continue by deft. MERLO filed. Copy mailed 11/30/73.

11/30/73 Motion to continue by deft. LAUER filed. Copy mailed 11/30/73.

11/30/73 Motion of deft. MERLO for discovery filed. Copy mailed 11/30/73.

11/30/73 Motion of deft. LAUER for discovery filed. Copy mailed 11/30/73.

11/30/73 Motion of defts., SLYMAN and GIRARD for severance separate trial with memorandum in support filed. Copy mailed 12/1/73.

11/30/73 Motion of defts., SLYMAN and GIRARD to supress evidence with memorandum in support filed. Copy mailed 11/30/73.

11/30/73 Motion of deft. Girard for the return of seized property Rule 41 (e) with affidavit in support filed. Copy mailed 11/30/73.

DATE	PROCEEDINGS

11/30/73 Motion of defts., Slyman and Girard for discovery filed. Copy mailed 11/30/73.

11/30/73 Motion of defts., Trifler, Chickeno, Slyman, Girard, Sidoris and Donovan to dismiss conspiracy count filed. Copy mailed 11/30/73.

11/30/73 Motion of defts., Spaganlo, Lorenzetti and Malvasi for extension of time within which to file motions to suppress with memorandum in support filed. Copy 11/30/73.

11/30/73 Motion of defts., Spaganlo, Lorenzetti and Malvasi for a bill of particulars with memorandum in support filed. Copy mailed 11/30/73.

12/3/73 Motion of the deft., DOMINIC RALPH BUZZACCO, for discovery pursuant to Rule 16 of the Fed. Rules of Criminal Procedure filed. Copy mailed 12/1/73.

12/3/73 Motion of Deft., DOMINIC RALPH BUZZACCO for bill of Particulars filed. Copy mailed 12/1/73.

12/3/73 Memorandum of deft., Dominic Ralph BUZZACCO in support of Motion for bill of particulars filed. Copy mailed 12/1/73.

12/3/73 Motion of defts., Louis Glassman and Sanford Glassman to inspect and copy all documents, etc. filed. Copy mailed 11/30/73.

12/3/73 Motion of defts. Louis & Sanford Glassman to dismiss indictment filed. Copy mailed 11/30/73.

12/3/73 Motion of defts. Louis & Sanford Glassman for severance, separate trial (oral hearing requested) filed. Copy mailed 11/30/73.

12/3/73 Motion of deft., Louis & Sanford Glassman for discovery and inspection filed. Copy mailed 11/30/73.

12/3/73 Motion of defts., Louis & Sanford Glassman to suppress filed. Copy mailed 11/30/73.

DATE	PROCEEDINGS

12/3/73 Motion of defts., Trifler, Chickeno, Sidoris and Donovan for discovery under Fed. Crim. Rule 16 and General Discovery with brief in support filed. Copy mailed 12/3/73.

12/3/73 Certified copies of pleading re: James Neil Girard and Joseph G. Slyman received form the District of Nevada filed. (2819)

12/4/73 Order that all defts. in this matter are granted until 12/12/73 within which to file additional motions; The Government is granted ten days thereafter to respond to said motions; In accordance with this Court's prior Order entered 11/12/73, trial is set for 1/14/74 filed. Krupansky, J., Copies mailed 12/4/73. (12/4/73)

12/7/73 Motion of the deft., Albert Kotoch, to dismiss count 1 and memorandum with memorandum in support filed. Copy mailed 12/7/73.

12/7/73 Memorandum of deft. Albert Kotoch in support of Motion for bill of particulars filed. Copy mailed 12/7/73.

12/11/73 Brief of Defts. Sanford and Louis Glassman in support of motion for severance and separate trial filed. Copy mailed 12/10/73.

12/11/73 Motion of defts' Trifler, Chickeno, Sidoris, Slyman, Girard, Donovan and Kotoch to controvert search warrant and return evidence seized and suppress wiretaps filed. Copy mailed 12/7/73.

12/12/73 Motion of deft., DOMINIC RALPH BUZZACCO, to suppress filed. Copy mailed 12/10/73.

12/12/73 Memorandum of deft., DOMINIC RALPH BUZZACCO, in Support of motion to suppress filed. Copy mailed 12/10/73.

12/12/73 Supplemental motion of defts., SPAGANLO, LORENZETTI AND MALVASI for extension of time within which to file motions to suppress filed. Copy mailed 12/12/73.

DATE	PROCEEDINGS

12/12/73 Motion of deft. JOSEPH FRANCIS MERLO to suppress filed, copy mailed 12/11/73.

12/12/73 Motion of deft. JACOB JOSEPH LAUER to suppress filed. Copy mailed 12/11/73.

12/12/73 Supplemental Motion of deft. VANIS RAY ROBBINS to suppress and request for oral hearing and arguement with memorandum in support filed. Copy mailed 12/ /73.

12/14/73 Order that all defts. are granted an extension to 12/30/73, within which to file additional motions to suppress; The Government's response date is extended to 1/8/74; In accordance with this Court's prior orders, tiral of this cause is scheduled to commence on 1/14/74 filed. Krupansky, J. (12/14/73)

12/18/73 Order directing counsel to confer & submit to the Court a single list of proposed questions to be directed to the jury panel during the voir dire examination no later than 1/10/74 filed. Krupansky, J. Copies to counsel. (12/18/73)

12/19/73 Request of deft. Albert Kotoch for permission to leave jurisdiction filed. Copy delivered 12/19/73.

12/20/73 Order granting deft. ALBERT KOTOCH request to leave the jurisdiction of this Court from 12/21/73 to 1/3/74 filed. Krupansky, J. (12/20/73)

12/26/73 Response of government to defts' motion for a bill of particulars filed. Copy mailed 12/26/73.

12/26/73 Response of Government to defts' Louis and Sanford Glassman Motion to Dismiss the Indictment filed. Copy mailed 12/26/73.

12/26/73 Motion of the Government requesting the Court to comment on the Risks of Joint Representation filed. Copy mailed 12/26/73.

DATE	PROCEEDINGS

12/26/73 Response of Government to deft's motions for discovery and inspection filed. Copy mailed 12/26/73.

12/26/73 Response of Government to defts' motion to dismiss count 1 of the Indictment filed. Copy mailed 12/26/73.

12/26/73 Response of Government to defts. Joseph Slyman and James Neil Girard's motion for severance—separate trial filed. Copy mailed 12/26/73.

12/26/73 Response of Government to defts Louis Glassman and Sanford Glassman's motion for severance—separate trial filed. Copy mailed 12/26/73.

12/26/73 Order that counsel for the U.S. submit to the Court a list of proposed questions to be directed to the jury panel during the voir dire examination. The list shall be presented to the Court not later than 1/10/74 filed. Krupansky, J. Copies mailed. (12/26/73)

12//28/73 Supplemental motion of defts. Harvey Trifler, Ernest Chickeno, George Frank Sidoris, Joseph Slyman, James Neil Girard, Thomas W. Donovan and Albert Kotoch to suppress and controvert search warrant with brief in support filed. Copy mailed 12/28/73.

12/28/73 Motion of defts. Joseph Anthony Spaganlo, Jack Lorenzetti and Michael Malvasi to suppress filed. Copy mailed 12/28/73.

1/3/74 Subpoena to testify retn. U filed. Served Robert F. Maruster on 1/2/74.

1/8/74 Response of Government to deft. Dominic Ralph Buzzacco's Motion to suppress filed. Copy mailed 1/8/74.

1/8/74 Response of Government to defts' Supplemental motion to suppress and controvert Search warrant filed. Copy mailed 1/8/74.

1/8/74 Response of Government to defts' motion to suppress filed. Copy mailed 1/8/74. (Spaganlo, Lorenzetti and Malvasi)

DATE	PROCEEDINGS

1/8/74 Response of the Government to defts' motion to controvert search warrant and return evidence seized and suppress wiretaps filed. Copy mailed 1/8/74. (James Blank)

1/8/74 Response of the Government to deft's/motion to suppress search warrant filed. Copy mailed 1/8/74.

1/8/74 Response of the Government to deft., Vara's motions to suppress filed. Copy mailed 1/8/74.

1/8/74 Response of the Government to deft, Vara's motions (filed 11/30/73) to suppress filed. Copy mailed 1/8/74.

1/8/74 Response of Government to defts' (Glassman and Glassman) motion to suppress filed. Copy mailed 1/8/74.

1/10/74 Questions requested by the Government to be asked of the jury panel in the above-entitled case filed. Copies mailed 1/10/74

1/11/74 Memorandum & order granting in part and denying in part various motions of the deft. for discovery filed. Krupansky, J. (1/11/74)

1/14/74 Minutes of proceedings filed. (Hearing on mos. to suppress begun but not concluded) Krupansky, J., Parise, r.

1/14/74 Memorandum and order denying motion of defts Kotoch, Trifler, Chickeno, Slyman, Girard, Sidoris and Donovan to dismiss the Indictment filed. Krupansky, J. (1/14/74)

1/14/74 Memorandum and order denying defts. Slyman & Girard's motion for severance; further, denying defts. Louis & Sanford Glassman's motion for severance filed. Krupansky, J. (1/14/74)

1/14/74 Memorandum & order granting in part and denying in part various motions of the defts. for Bill of Particulars filed. Krupansky, J. (1/14/74)

1/14/74 Motion of U.S.A. for order allowing breaking of seals on recordings, etc. filed.

DATE	PROCEEDINGS

1/14/74 Order that recordings be returned to F.B.I. until trial, further that U.S.A. may break seals, etc. filed. Krupansky, J. (1/14/74)

1/15/74 Memorandum of deft. Spaganlo Re: violation of sealing requirements filed.

1/15/74 Memorandum of deft. Spaganlo re: Use of toll call records, etc. filed.

1/15/74 Minutes of proceedings filed. (Hearing on mo's of defts. to suppress resumed and concluded; taken under advisement) Krupansky, J., Parise, r.

1/15/74 Government's Memorandum in compliance with Court's order of 1/11/74 filed. Copies mailed 1/15/74.

1/16/74 Supplementary memorandum of the Government in response to defts' motions to suppress filed. Copy served 1/16/74.

1/16/74 Subpoena to testify retn. & filed. Served Jeanette Miscurec on 1/12/74. FEES: $2.00

1/16/74 Subpoena to testify retn. & filed. Served Lou Rosen on 1/12/74. FEES: $6.00

1/16/74 Subpoena to Produce Document or Object retn. & filed. Served Ronald Taylor on 1/12/74. FEES: $12.44

1/17/74 Subpoena to produce document retn. & filed. Served Ruth Biggs on 1/14/74. FEES: $0—

1/17/74 Subpoena to testify retn. & filed. Served Edward E. Sims on 1/14/74 FEES: 0

1/18/74 Minutes of proceedings filed. Krupansky, J., Parise, r. (*ALBERT KOTOCH*—Plea of not guilty withdrawn, plea of guilty entered to Ct. 2, Upon motion of U.S. Atty. Count 1 of Indictment dismissed as to Kotoch. Sentence: Fine $7,500.00 I.S.S., Prob ordered for 3 yrs.)

DATE	PROCEEDINGS

*1/18/74 Minutes of proceedings filed. Krupansky, J., Parise, r. (Trial to the Jury begun; adjourned until 1/22/74 RE: Spaganld, Trifler, Chickeno, Slyman, Girard, Sidoris, L. Glassman, S. Glassman, Lorenzetti, Malvasi & Blank only)

1/18/74 Order that defts. Dominic Ralph Buzzacco, Vanis Ray Robbins, Thomas W. Donovan, Jacob Joseph Lauer, and Joseph Francis Merlo are severed from the remaining defendants for purposes of trial filed. Krupansky, J.

1/17/74 Memorandum and Order denying motions of all defts. to (1/21/74) suppress in exception of defts. Spaganlo, Lauer, Robbins, Donovan & Buzzacco filed. Krupansky, J. (1/17/74)

1/21/74 Memorandum in support of a motion to suppress and severance of defts. Sanford Glassman and Louis Glassman filed. Copy mailed 1/21/74.

1/21/74 Subpoena to Produce Document or Object retn. & filed. Served Mr. W. Messenger on 1/14/74. FEES: $2.00

1/21/74 Subpoena to Produce Document of Object retn. & filed. Served Mr. John P. Koch on 1/15/74. FEES: $2.00

1/21/74 Subpoena to Testify retn. & filed. Served Richard Wellman on 1/15/74. FEES: $4.40

1/22/74 Subpoena to testify retn. & filed. Served Albert Kotoch on 1/21/74. FEES: $0.

1/22/74 Minutes of proceedings filed. Krupansky, J., Parise, r. (Trial to the jury resumed; adjourned to 1/23/74)

1/22/74 Judgment and Order of Probation filed. (RE: ALBERT KOTOCH) Krupansky, J. (1/23/74)

1/23/74 Subpoena to testify retn. & filed. Served Joe Mario Fezzuoglio on 1/22/74. FEES: $0

1/23/74 Minutes of proceedings filed. Krupansky, J., Parise, r. (Trial to the Jury resumed; adjourned to 1/24/74)

DATE	PROCEEDINGS
1/24/74	Minutes of proccedings filed. Krupansky, J., Parise, r. (Trial to the Jury resumed; adjourned to 1/25/74)
1/24/74	Subpoena to testify retn. & filed. Served Daniel T. Shay on 1/17/74. FEES: $11.24.
1/24/74	Subpoena to testify retn. & filed. Served David Perelman on 1/18/74. FEES: $6.60.
1/24/74	Subpoena to testify retn. & filed. Served Robert E. Stell on 1/18/74. FEES: $6.40.
1/24/74	Subpoena to testify retn. & filed. Served Robert Sheridan on 1/19/74. FEES: $4.60.
1/24/74	Subpoena to testify retn. & filed. Served Hayden James Davis on 1/21/74. FEES: $3.68.
1/25/74	Minutes of proceedings filed. Krupansky, J., Parise, r. (Trial to the Jury resumed; adjourned to 1/28/74)
1/26/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (Voire dire hearing w/o jury re: identification of tape recordings begun but not concluded; adj. to 1/27/74)
1/27/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (Voire dire hearing resumed but not concluded)
1/28/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (Trial to the Jury resumed; jury excused. Voire dire hearing resumed not concluded, adj. to 1/29/74)
1/29/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (Hearing on voire dire of witnesses re: tape recordings resumed but not concluded; adj. to 1/30/74)
1/30/74	Proposed Jury Instructions of the Government filed. Copies mailed 1/30/74.
1/30/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (Trial to jury resumed. Voire dire hearing resumed. Adjourned to 1/31/74)

DATE	PROCEEDINGS
1/31/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (Trial to jury resumed. Adjourned to 2/1/74)
2/1/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (Trial to Jury resumed. Adjourned to 2/4/74)
2/4/74	Subpoena to Testify retn. & filed. Served Robert Sheridan on 2/1/74.
2/5/74	Order of Contempt Re: Jerry Milano filed. Krupansky, J. (2/6/74)
2/4/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (Trial to jury resumed. Adjourned to 2/5/74)
2/5/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (trial to Jury resumed. Adjourned to 2/6/74)
2/6/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (trial to Jury resumed. Adjourned to 2/7/74)
2/7/74	Subpoena to testify retn. & filed. Returned unexecuted as to Mark Bushieb. FEES: $3.60
2/7/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (trial to jury resumed. Adjourned to 2/8/74)
2/8/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (trial to jury resumed. Adjourned to 2/11/74)
2/11/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (trial to jury resumed. Adjourned to 2/12/74)
2/12/74	Minutes of proceedings filed. Krupansky, J., Thompson, r. (trial to Jury resumed. Adjourned to 2/13/74)
2/8/74	Subpoena to Testify retn. & filed. Returned unexecuted as to Clifton Watson on 1/15/74.
2/12/74	Subpoena to Testify retn. & filed. Served on Alice Roberts on 2/8/74.
2/12/74	Subpoena to Testify retn. & filed. Served Virginia Frantz on 2/8/74.

DATE	PROCEEDINGS

2/12/74 Subpoena to Testify retn. & filed. Served Josephine Leufkens on 2/8/74.

2/12/74 Subpoena to Testify retn. & filed. Served J. W. Caine on 2/8/74.

2/12/74 Subpoena to Testify retn. & filed. Served Norma Ols on 2/8/74.

2/13/74 Minutes of proceedings filed. Krupansky, J., Thompson, r. (trial to Jury resumed. Adjourned to 2/14/74)

2/14/74 Minutes of proceedings filed. Krupansky, J., Thompson, r. (trial to Jury resumed. Adjourned to 2/15/74)

2/14/74 Notice of APPEAL by the Government re: Order of January 17, 1974 filed.

2/19/74 Minutes of proceedings filed. M. Conties, J., Thompson, r. (trial to Jury resumed. Adjourned to 2/20/74)

2/20/74 Certificate and declaration pursuant to Fed. R. Crim. P. 25(a) filed. Contie, J. (2/20/74)

2/20/74 Order that for reasons of health the Hon. Robert B. Krupansky cannot conclude the trial in the above captioned cause of action and that the Hon. Leroy J. Contie, Jr. has certified that he has familarized himself with the record pursuant to Rule 25(a) of the Fed. R. of Crim. Procedure, the Hon. Leroy J. Conite is hereby assigned to complete the trial in the above captioned cause of action filed. Battisti, J. (2/20/74)

2/20/74 Minutes of proceedings filed. Conite, J., Thompson, r. (trial to Jury resumed. Adjourned to 2/21/74)

2/21/74 Order that the Indictment herein is dismissed as to deft. MICHAEL MALVASI only filed. Krupansky, J. (2/21/74)

2/21/74 Minutes of proceedings filed. Contie, J., Thompson, r. (Trial to the Jury resumed. Adjourned to 2/22/74)

2/22/74 Minutes of proceedings filed. Conite, J., Thompson, r. (trial to the Jury resumed. Adjourned to 2/25/74)

DATE	PROCEEDINGS

2/25/74 Minutes of proceedings filed, Contie, J. Thompson, R. (trial concluded verdict of guilty on Ct. 1 as to defts. SPAGANLO and TRIFLER; verdict of not guilty on Ct. 2 as to said defts; verdict of not guilty as to defts. CHICKENO, SLYMAN, GIRARD, SIDORIS, LOUIS GLASSMAN, SANFORD GLASSMAN, LORENZETTI and BLANK on both Cts, defts. SPAGANLO and TRIFLER referred for pre-sent. report, bonds continued.)

2/25/74 Verdict filed.

2/26/74 Govt. Ex. 44 and Defts' Ex. O (money & list) in VAULT ROOM 330 (top left drawer)

2/26/74 All other exhibits in room 111A, Shelf 7034, except jurors notes shelf 7039.

2/26/74 Order (upon a verdict by the jury) that the Indictment herein is dismissed as to defts. Ernest Chickeno, Joseph Slyman, James Neil Girard, George Frank Sidoris, Louis Glassman, Sanford Glassman, Jack Lorenzetti and James Blank; further order that Count II of the Indictment only is dismissed as to defts. Joseph Anthony Spaganlo and Harvey Trifler filed. Contie, J. (2/26/74)

2/27/74 Marshal's retn. on Subpoena to Produce Document or object filed. Served Karen Pavlich on 2/13/74. FEES: $2.00

2/27/74 Marshal's retn. on Subpoena to testify filed. Served Mr. Regis Yoest on 2/14/74. FEES: $4.40

2/27/74 Subpoena to Produce Document retn & filed. Served Nelson Petit on 1/14/74. FEES: $—

2/27/74 Subpoena to Produce Document retn. & filed. Served David Gibson on 1/14/74. FEES: $0—

3/4/74 Subpoena to testify retn. & filed. Served Robert Windle on 2/11/74.

DATE	PROCEEDINGS

3/4/74 Subpoena to testify retn. & filed. Served William McGee on 2/11/74.

3/4/74 Subpoena to testify retn. & filed. Served Karen Pavlich on 2/11/74.

3/6/74 Designation of record on appeal by Appellant filed. Copy mailed 3/6/74.

3/11/74 Warrant for Arrest of deft. retn. & filed. Executed by FBI on 11/26/73.

3/21/74 Order the time for filing the certified record on appeal in the United States Court of Appeals for the 6th Circuit is hereby extended to 5/24/74 to enable the court reporter to complete the transcript filed. Krupansky, J. Copies mailed. (3/21/74)

3/26/74 Order that the application of Harvey Trifler for permission to leave the State of Ohio to travel to the State of Nevada during the period of March 27, 1974 to April 1, 1974 is granted filed. Contie, J..True copy to Trifler. (3/26/74)

[Filed November 1, 1973]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Criminal No. ———

Violation of Title 18, United States Code, Sections 1955, 371, and 2

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALBERT KOTOCH, JOSEPH ANTHONY SPAGANLO, HARVEY TRIFLER, ERNEST CHICKENO, JOSEPH SLYMAN, JAMES NEIL GIRARD, GEORGE FRANK SIDORIS, LOUIS GLASSMAN, SANFORD GLASSMAN, DOMINIC RALPH BUZZACCO, JACK LORENZETTI, MICHAEL MALVASI, VANIS RAY ROBBINS, THOMAS W. DONOVAN, JAMES BLANK, JACOB JOSEPH LAUER, JOSEPH FRANCIS MERLO, DEFENDANTS

INDICTMENT

The Grand Jury charges that:

COUNT I

From on or about October 15, 1971, the exact date being to the Grand Jury unknown, and continuing thereafter, up to and including the date of this indictment, in the Northern District of Ohio, and elsewhere, ALBERT KOTOCH, JOSEPH ANTHONY SPAGANLO, HARVEY TRIFLER, ERNEST CHICKENO, JOSEPH SLYMAN, JAMES NEIL GIRARD, GEORGE FRANK SIDORIS, LOUIS GLASSMAN, SANFORD GLASS-

MAN, DOMINIC RALPH BUZZACCO, JACK LORENZETTI, MICHAEL MALVASI, VANIS RAY ROBBINS, THOMAS W. DONOVAN, JAMES BLANK, JACOB JOSEPH LAUER, and JOSEPH FRANCIS MERLO, defendants herein, did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree together, with each other and with KENNETH C. JONKE, FRANK L. ZELL, and DANIEL P. CARDILLO, named as co-conspirators but not as defendants herein, and with diverse other persons to the Grand Jury unknown, to commit offenses against the United States, to wit: To violate Section 1955, Title 18, United States Code, by conducting, financing, managing, supervising, directing, and owning all or part of an illegal gambling business, that is, a sports book, in the Northern District of Ohio, and the Southern District of Ohio, such business being in substantially continuous operation for a period in excess of thirty (30) days, and having a gross revenue of $2,000 on one or more single days, involving five (5) or more persons in its conduct, financing, management, supervision, direction, and ownership and being in violation of the laws of the State of Ohio, Sections 2915.01, 2915.06, 2915.09, and 2915.12 of the Ohio Revised Code.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed:

1. On or about the 15th day of April, 1972, in the Northern District of Ohio, JAMES NEIL GIRARD asked Jeanette Misurec for permission to use the basement of her home for an office.

2. On or about the 5th day of December, 1972, in the Northern District of Ohio, ALBERT KOTOCH accepted a wager by telephone.

3. On or about the 8th day of December, 1972, ALBERT KOTOCH, who was then in the Northern District of Ohio, received bets from THOMAS W. DONOVAN.

4. On or about the 10th day of December, 1972, in the Northern District of Ohio, ALBERT KOTOCH discussed "bottom figures" with GEORGE SIDORIS.

5. On or about the 26th day of December, 1972, in the Northern District of Ohio, ALBERT KOTOCH and JOSEPH ANTHONY SPAGANLO had a conversation concerning "line" information.

6. On or about the 27th day of December, 1972, in the Northern District of Ohio, LOUIS GLASSMAN received instructions for betting several football games from ALBERT KOTOCH.

7. On or about the 1st day of January, 1973, in the Northern District of Ohio, ALBERT KOTOCH and ERNEST CHICKENO discussed the money that ERNEST CHICKENO had collected from bettors for ALBERT KOTOCH.

8. On or about the 1st day of January, 1973, ALBERT KOTOCH, who was then in the Northern District of Ohio, and DOMINIC RALPH BUZZACCO discussed their "bottom figures".

9. On or about the 3rd day of January, 1973, VANIS RAY ROBBINS and HARVEY TRIFLER, who was then in the Northern District of Ohio, discussed their "bottom figures".

All in violation of Section 371, Title 18, United States Code.

The Grand Jury further charges that:

COUNT II

Beginning on or about October 15, 1971, the exact date being to the Grand Jury unknown and continuing thereafter up to and including the date of this indictment, in the Northern District of Ohio, and elsewhere, ALBERT KOTOCH, JOSEPH ANTHONY SPAGANLO, HARVEY TRIFLER, ERNEST CHICKENO, JOSEPH SLYMAN, JAMES NEIL GIRARD, GEORGE FRANK SIDORIS, LOUIS GLASSMAN, SANFORD GLASSMAN, DOMINIC RALPH BUZZACCO, JACK LORENZETTI, MICHAEL MALVASI, VANIS RAY ROBBINS, THOMAS W. DONOVAN, JAMES BLANK, JACOB

JOSEPH LAUER, and JOSEPH FRANCIS MERLO, defendants herein, and KENNETH C. JONKE, FRANK L. ZELL, and DANIEL P. CARDILLO, named as co-accomplices but not as defendants herein, and diverse other persons to the Grand Jury unknown, did knowingly, unlawfully, and willfully conduct, finance, manage, supervise, direct, and own all or part of an illegal gambling business, to wit: a sports book being conducted in the Northern and Southern Districts of Ohio, such business being in substantially continuous operation for a period in excess of thirty (30) days and having a gross revenue of $2,000 or more on one or more single days, involving five (5) or more persons in its conduct, financing, management, supervision, direction, and ownership and being in violation of Sections 2915.01, 2915.06, 2915.09, and 2915.12 of the Ohio Revised Code.

All in violation of Section 1955 and 2, Title 18, United States Code.

This Is A True Bill.

/s/ Michael P. Fedock
Foreman

/s/ Frederick M. Coleman
FREDERICK M. COLEMAN
United States Attorney

/s/ David Margolis
DAVID MARGOLIS
Special Attorney
U. S. Department of Justice

DATE: November 1, 1973

[Filed November 28, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

APPLICATION

Steven R. Olah, an Attorney with the Organized Crime and Racketeering Section of the United States Department of Justice, being duly sworn states:

This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering, Section, United States Department of Justice, Washington, D. C., together with Agents of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer —of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is—he is an Attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable Richard G. Kleindienst, has specifically designated the Assistant Attorney General of the Criminal Division, the Honorable

Henry E. Petersen, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to authorize this Application. Under the powers specially delegated to him by the Attorney General, the Assistant Attorney General of the Criminal Division has authorized this Application. Attached to this Application as Exhibit A are a copy of the Order of the Attorney General specifically designating the Assistant Attorney General of the Criminal Division to act in these matters, the memorandum of authorization approved by the Assistant Attorney General of the Criminal Division, the Honorable Henry E. Petersen, and the letter of authorization in the name of the Assistant Attorney General of the Criminal Division, the Honorable Henry E. Petersen, addressed to David Margolis, Attorney in Charge, Cleveland Strike Force.

3. This application seeks authorization to intercept wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres, and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is—offenses involving the conducting, financing, managing, supervision, directing, or owning all or part of an illegal gambling business that violates the laws of the State of Ohio and violates Section 1955 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code, which have been committed and are being committed by Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others as yet unknown.

4. Section 803 of Title VIII, entitled Syndicated Gambling of the "Organized Crime Control Act of 1970", Public Law 91-452, 91st Congress, approved October 15, 1970, Amended Chapter 95, Title 18, United States Code, by adding a new section, Section 1955, Prohibition of Illegal Gambling Businesses. Section 801 of Title VIII of this Act contains special findings that illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof.

5. The prohibited illegal gambling business described herein violates the laws of the State of Ohio, specifically one or more of the following sections: 2915.06, 2915.09, 2915.15.12, 2915.122 and 2915.14 of the Ohio Revised Code.

6. He has discussed all the circumstances of the above offenses with Special Agent Richard L. Ault, Jr., of the Cleveland, Ohio Office of the Federal Bureau of Investigation who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Ault (attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others as yet unknown have committed and are committing offenses involving the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business in violation of Section 1955 of Title 18, United States Code and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others as yet unknown concerning these offenses will be obtained through the interception, authorization for which is herein applied. In particular, these wire communications will concern the placing and receiving of sports bets and action and the dissemination of "line" information.

(c) normal investigative procedures reasonably appear to be unlikely to succeed if tried.

(d) there is probable cause to believe that the telephones numbered (216) 777-0850 and (216) 777-0851, both located at Apartment 512, 25151 Brook-

park Road, North Olmsted, Ohio, and both subscribed to by Richard Wellman and the telephones numbered (216) 453-6114 subscribed to by Annette Florea and billed to George Florea and (216) 452-1624 subscribed to by Margret Delerba, both located at 204 Broad Avenue, Northwest, Canton, Ohio, have been used and are being used by Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres, and others as yet unknown in connection with the commission of the above-described offenses.

7. No previous application is known to have been made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities, or places specified herein, except as follows:

(a) Joseph Anthony Spaganlo was a subject of interception of wire communications pursuant to an order signed by the Honorable Judge Frank J. Battisti on October 2, 1969, at 10:30 a.m., authorizing the interception of wire communications to and from telephone numbers (216) 241-6162, (216) 241-6639, (216) 696-4085, (216) 861-4756, (216) 781-1587, and (216) 781-1996, all located on the second floor at 3064 West 25th Street, Cleveland, Ohio, and,

(b) Raymond Paul Vara was a subject of interception of wire communications pursuant to an order signed by the Honorable Judge Frank J. Battisti on November 6, 1969, at 10:25 a.m., authorizing the interception of wire communications to and from telephone numbers (216) 792-8321 and (216) 792-8430, both located at 1218 South Meridian Avenue, Youngstown, Ohio.

WHEREFORE, your affiant believes that probable cause exists to believe that Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others as yet unknown are conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling

business involving five or more persons which has been or remains in substantially continuous operation for a period in excess of thirty days and violates the laws of the State of Ohio, and which therefore is in violation of Section 1955 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code; that Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others as yet unknown have used, and are using the telephones numbered (216) 777-0850 and (216) 777-0851 both located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and both subscribed to by Richard Wellman and the telephones numbered (216) 453-6114 subscribed to by Annette Florea and billed to George Florea and (216) 452-1624 subscribed to by Margaret Delerba, both located at 204 Broad Avenue, Northwest, Canton, Ohio, in connection with the commission of the above-described offenses; that communications of Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others as yet unknown concerning these offense will be intercepted to and from the above-described telephones; and that normal investigative procedures reasonably appear to be unlikely to succeed if tried.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Richard L. Ault, Jr., which is attached and made a part of this application, affiant requests that this court issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code authorizing the Federal Bureau of Investigation of the United States Department of Justice to intercept wire communications to and from the above-described telephones, which interceptions shall not automatically terminate when the described types of communications have first been obtained, but shall continue until communications are intercepted which reveal the manner in which Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others as yet unknown participate in the conducting, financing,

managing, supervising, directing or owning all or part of an illegal gambling business in violation of Title 18, United States Code, Section 1955 and the laws of the State of Ohio and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of that order, whichever is earlier.

It is further requested that this court issue an order pursuant to the power conferred on it by Section 2518 (4)(e) of Title 18, United States Code, directing that the Ohio Bell Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Ohio Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

/s/ Steven R. Olah

Subscribed and sworn to before me this 28th day of November, 1972.

/s/ Frank J. Battisti
United States District Judge

[Filed November 28, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS

AFFIDAVIT

I, RICHARD L. AULT, JR., Special Agent, Federal Bureau of Investigation, Cleveland, Ohio, being duly sworn, state:

I. I am an "investigative or law enforcement officer . . . of the United States" within the meaning of Title 18, United States Code, Section 2510(7)—that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Title 18, United States Code, Section 2516.

II. This affidavit seeks authorization to intercept wire communications concerning offenses involving violations of Title 18, United States Code, Section 1955, and a conspiracy to commit the aforesaid offenses in violation of Title 18, United States Code, Section 371, which have been and are now being committed by ALBERT KOTOCH, JOSEPH ANTHONY SPAGANLO, ERNEST CHICKENO, RAYMOND PAUL VARA, GEORGE M. FLOREA, and SUZANNE VERES and others, as yet unknown.

III. I have personally conducted the investigation of this offense and because of my personal participation in this investigation, and of reports made to me by other

Agents of the Federal Bureau of Investigation, I am familiar with all the circumstances of the offense. Based on this familiarity, I allege the facts contained in the paragraphs below to show that:

a. There is probable cause for a belief that ALBERT KOTOCH, JOSEPH ANTHONY SPAGANLO, ERNEST L. CHICKENO, RAYMOND PAUL VARA, GEORGE M. FLOREA, and SUZANNE VERES, and others, as yet unknown, have been and are now committing and will continue to commit offenses against the United States, that is to say:

Conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business which has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day in violation of Title 18, United States Code, Section 1955 (the laws of the State of Ohio, specifically Ohio Revised Code, Sections 2915.06, 2915.11, 2915.13. and 2915.14), and conspiring to commit the above offense in violation of Title 18, United States Code, Section 371.

b. There is probable cause for belief that particular wire communications concerning these offenses will be obtained through wire interceptions, authorization for which is applied for herein.

c. Normal investigative procedures reasonably appear unlikely to succeed, if tried.

d. There is probable cause to believe that telephone (216) 777-0850, (216) 777-0851, located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, subscribed to by RICHARD WELLMAN and telephone numbers (216) 453-6114 and (216) 452-1624 located at 204 Broad Avenue, Canton, Ohio, utilized by GEORGE FLOREA, at the same address, are being used and will continue to be used in carrying out the offenses detailed above, all of which appeal more fully hereinafter.

e. Section 801, of Title VIII of the Organized Crime Control Act of 1970, Public Law 91-452. 91st Congress, October 15, 1970, contains special findings that illegal

gambling involves the widespread use of, and has an effect upon, interstate commerce and the facilities thereof.

IV. From my three years experience in the Federal Bureau of Investigation, including two years experience in investigation of gambling violations, and from consultation with other Special Agents of the Federal Bureau of Investigation, I know that a bookmaking business of any size requires a bookmaker to balance his books. That is, at the end of betting on a certain event, the bookmaker hopes to achieve an ideal situation of having the total amount he must pay out the same regardless of who wins. In this way the bookmaker cannot be a loser no matter what the outcome of the sport contest, for he keeps a small premium on each bet placed with him. The bookmaker, then, operates on a profit margin. He does not gamble on the outcome of any given event.

I further know that:

a. In order for a bookmaker to balance his books, it is almost always necessary for him to have another bookmaker with whom he can place the bets which have unbalanced his books. This second bookmaker is known as a "lay-off" bookmaker, and the above mentioned process is known as "laying off." This second bookmaker, the "lay off" bookmaker, must also balance his books, thus the process may be repeated many times over and involve people in all parts of the United States.

b. A bookmaker must also receive and furnish "line" information. This is necessary to stimulate the betting activity and to enable him to operate his business with the greatest chance of profit. The "line" is the point spread or odds in an athletic contest. "Line" information will vary throughout the day and is governed by the amount of money wagered on a game with and by a particular bookmaker. The "lines," or odds, can and do go up or down depending on the amount of money bet on any one event. During the baseball season, which is from March to October, a bookmaker will generally receive and give out the "line" and accept and place wagers in the late morning and early afternoon hours

because the baseball games begin in the afternoon and the betting activity must be completed before the game begins. One of the first calls of each day made or received by a bookmaker, involves "line" information. The bookmaker will receive his "line" from a handicapper who specializes in determining what the odds will be in an athletic contest. The bookmaker will then furnish the "line" to his customers who will read it, compare it with other "lines" and make a wager. To do this, constant access to a telephone is a necessity.

c. Gamblers have special terms. For example, they usually refer to the amount of a bet in terms much smaller than the actual amount. As an example, a wager being made for a "dime" usually meas a wager of $1,000; and for a "nickel" usually means for $500. These terms are also variable according to the customary size of the gambling operation. Thus, a "dime" may mean $10, $100, or $1,000 depending on the understanding between the two conversants. A bet of a "buck" would normally mean a wager for $100. Bookmakers do this in order to avoid revealing the actual size of the wagers.

V. FACTS AND CIRCUMSTANCES

1. INVESTIGATION AS SET FORTH HEREIN, INDICATES THAT ALBERT KOTOCH, JOSEPH A. SPAGANLO, AND ERNEST L. CHICKENO, ARE ENGAGED IN A BOOKMAKING BUSINESS WITH RAYMOND P. VARA, GEORGE M. FLOREA, AND SUZANNE VERES.

A. Sources of information have been contacted by Special Agents of the Federal Bureau of Investigation who have in turn related to affiant information set forth herein:

a. Source Number One, hereinafter referred to as Source One, has been a reliable source of the Cleveland Division of the Federal Bureau of Investigation in excess of eight years and has provided accurate and reliable information concerning gambling cases on at least seventy occasions, at least two of which led directly to arrests

and conviction of thirteen gamblers. Source One, who resides in Northern Ohio, is aware of the gambling activities of AL KOTOCH and JOSEPH SPAGANLO through the source's personal acquaintance with these individuals and through source's personal conversations with KOTOCH and SPAGANLO concerning their gambling activities.

On February 24, 1972, Source One advised Special Agents of the Federal Bureau of Investigation that AL KOTOCH was extremely active in booking bets and was considered to be one of the major bookmakers in the Cleveland, Ohio, area.

b. Source Number Two, hereinafter referred to as Source Two, has been a source of the Cleveland Division of the Federal Bureau of Investigation for six months. Source has provided gambling information on two occasions which has been proven accurate by independent investigation by Special Agents of the FBI. Source, who resides in Cleveland, Ohio, is aware of the gambling activities of AL KOTOCH and JOE SPAGANLO through source's association, and conversations, with AL KOTOCH and JOE SPAGANLO, concerning their gambling activities.

On May 10, 1972, Source Two advised Special Agents of the FBI that JOE SPAGANLO is currently booking sports bets. Source further adviced that source has learned through conversations with SPAGANLO and KOTOCH that SPAGANLO and KOTOCH are associated with each other in booking sports bets.

c. SHELDON JAFFE, who resides in Los Angeles, California, was interviewed by Special Agents of the FBI in regard to a gambling investigation which was previously conducted concerning AL KOTOCH, on April 19, 1972, and provided the following information:

JAFFE stated that he personally knew ALBERT K. KOTOCH of Cleveland, Ohio, and knew him to be a bookmaker. JAFFE said KOTOCH was one of the top five bookmakers in the Cleveland area, and he always dealt directly with KOTOCH with the exception of a few "pay" and "collect" days in which he dealt with an

individual named JOHNNY whose last name is unknown to the source. JAFFE said he always called directly to AL KOTOCH and he would bet as much as $25,000 a week with KOTOCH by between two hundred to two thousand dollars on thirty or forty different sporting events. He stated that KOTOCH would accept any size bet and had no actual gross limit.

JAFFE stated that his first dealings with KOTOCH as a bettor were in September or October, 1968. He stated that for approximately six months, he usually bet only a few hundred dollars a game, before he moved from Cleveland to Los Angeles. JAFFE advised he moved back to Cleveland in January, 1970, and it was from September or October, 1970, to the end of the football season of 1970 that he bet heavily with AL KOTOCH.

JAFFE stated that during the time described above, he would settle up with KOTOCH each week. JAFFE stated that he worked on a percentage basis with KOTOCH in that if he won, he would take only fifty percent of his winnings and leave fifty percent in a fund to cover possible losses from future betting. JAFFE believes he pretty much broke even for the season of 1970, and he never got hurt by the "vig" i.e., the amount that bookmakers charge to accept bets. He stated that he made out $7,600 in postdated checks to AL KOTOCH in payment for gambling debts owed KOTOCH.

JAFFE said that AL KOTOCH asked him to call Los Angeles and obtain "line" information from people that JAFFE knew in Los Angeles and that he refused to do so.

d. On September 13, 1972, Source One advised Special Agents of the FBI that through conversation with AL KOTOCH and JOE SPAGANLO source has learned that AL KOTOCH and JOE SPAGANLO are aligned with each other in a bookmaking operation, and that they exchange "line" information. Source considers AL KOTOCH to be one of the largest bookmakers in the Cleveland area, who handles an extensive volume of sports booking.

Source One further stated that through conversations with AL KOTOCH and JOSEPH SPAGANLO source has

learned that "CHICK" CHICKENO is closely allied with AL KOTOCH in his bookmaking operation and that Source One knows personally that CHICKENO for years, has been involved in bookmaking, and has always worked for someone rather than attempt to run his own book.

On September 26, 1972. Source One advised Special Agents of the FBI that through conversations with AL KOTOCH and JOE SPAGANLO, source learned CHICKENO is affiliated with AL KOTOCH in bookmaking operations and this relationship has existed for some time. Source advised that CHICKENO's affiliation with KOTOCH is that of an employee.

On October 24, 1972, Source Number One advised Special Agents of the FBI that through conversations with AL KOTOCH and JOE SPAGANLO, source learned that AL KOTOCH and JOE SPAGANLO are still operating as bookmakers in the Cleveland, Ohio, area and exchanging "line" information. Source Number One further advised that ERNEST CHICKENO is still working with AL KOTOCH in KOTOCH's and SPAGANLO's bookmaking operation.

On November 9, 1972, Source Number One advised Special Agents of the FBI that through conversations with AL KOTOCH and JOE SPAGANLO that source had learned as recently as November 3, 1972, that SPAGANLO and KOTOCH are continuing to operate their bookmaking business in the Cleveland, Ohio, area, and are continuing to exchange line information. Source Number One further advised that in recent conversations as late as November 3, 1972, with KOTOCH and SPAGANLO that ERNEST CHICKENO was continuing to work with AL KOTOCH in KOTOCH's and SPAGANLO's bookmaking operation.

e. Source Number Three, hereinafter referred to as Source Three, has ben a source of the Cleveland Office of the FBI in excess of nine years and has provided accurate information to the Cleveland Division on at least fifty occasions, which has been corroborated through investigation by Special Agents of the FBI. Source Three has provided information which has contributed directly to the arrests and convictions of five gamblers

on at least five occasions. Source Three is aware of the activities of AL KOTOCH and JOSEPH SPAGANLO through the source's own gamblng activities and through the fact that the source places wagers with KOTOCH and SPAGANLO.

On September 28, 1972, Source Three advised that AL KOTOCH is currently booking from telephone number (216) 777-0850 and that source has personally placed wagers with KOTOCH by calling KOTOCH on telephone number 777-0850.

On September 21, 1972, a review of the records of the Ohio Bell Telephone Company, Cleveland, Ohio, by affiant shows telephone number (216) 777-0850 is listed to RICHARD WELLMAN, Apartment No. 512, 25151 Brookpark Road, North Olmsted, Ohio. The records further reflect that telephone number (216) 777-0851 and (216) 777-0850 are also located at this apartment.

Previous investigation conducted by Special Agents of the FBI, the results of which are related to affiant, in connection with the gambling activities of JOE SPAGANLO in 1969, 1970, and 1971, have shown that the name RICHARD WELLMAN is a fictitious name which was used by JOE SPAGANLO in connection with the above-mentioned address. This name was used at one time by SPAGANLO to disguise the identity of the true subscriber to telephone number 777-1225, which was in Apartment 512, at above address.

On October 24, 1972, Source Number Three advised that AL KOTOCH is still working as a bookmaker from telephone number (216) 777-0850 and that source is aware that KOTOCH is using the above-mentioned telephone number inasmuch as source has personally placed wagers with KOTOCH by calling KOTOCH at the above-mentioned telephone number.

On November 8, 1972, Source Number Three advised that as recently as November 6, 1972, the Source placed a wager with AL KOTOCH at phone number (216) 777-0850.

f. Source Number Four hereinafter referred to as Source Four, has been a source of the Cleveland Division

of the FBI for at least six years and has provided information concerning gambling activities which has been corroborated by Special Agents of the FBI on at least ten different occasions, and which has led directly to the conviction in Federal Court of at least three gambling figures since 1969. Source Four knows of the activities of JOSEPH SPAGANLO, GEORGE FLOREA, and AL KOTOCH from personal knowledge gained from source's close association, and conversations, with the above-mentioned individuals, and through conversations and association with bookmakers who lay off wagers and exchange wagers with JOSEPH SPAGANLO, RAYMOND VARA, GEORGE FLOREA and AL KOTOCH.

On September 29, 1971, Source Four advised that through conversations with GEORGE FLOREA, source has learned that RAYMOND VARA is furnishing sports "line" information from inside the State of Nevada to GEORGE FLOREA and JOE SPAGANLO for use in their bookmaking activities.

On December 3, 1971, Source Four advised that through conversations with GEORGE FLOREA that the telephone number which SPAGANLO is currently utilizing in connection with his bookmaking activities is (216) 221-3880.

A review of the toll records of the Ohio Bell Telephone Company on September 21, 1972, by Special Agents of the FBI indicated that (216) 221-3880 was listed to ERNEST CHICKENO, Apartment 1621, 12900 Lake Avenue, Lakewood, Ohio. Records also show that this number was disconnected as of this date and no replacement telephone was re-issued. Records further reflect that telephone number (216) 228-1495 is listed to ERNEST CHICKENO at the above address.

Source Four advised on September 22, 1972, that through conversations with GEORGE FLOREA source has learned that GEORGE FLOREA, Canton, Ohio, telephonically contacts JOE SPAGANLO in Cleveland, Ohio, and exchanges wagering information.

Source Four advised further on September 22, 1972, that source learned through conversations with NELLO RONCI, who has admitted to source as recently as September 22, that he is a bookmaker, and who bets with SPAGANLO, that SPAGANLO and his partner, whose name was not fully known to source as of September 22, 1972, are operating in the Cleveland, Ohio, area, as bookmakers, and continue to be in daily contact with RAYMOND VARA in Las Vegas, Nevada. The source advised that the purpose of these telephone calls is to exchange "line" information. Source Four further stated that during the course of a conversation with FLOREA, the source learned that VARA contacts SPAGANLO or his girlfriend, SUZANNE VERES, in the Cleveland, Ohio, area daily at approximately 11:45 a.m., and the "line" is furnished for use in SPAGANLO's daily bookmaking operation in the Cleveland area.

Source Four advised on September 22, 1972, that the source personally knows from conversations with GEORGE FLOREA, that VARA has furnished "line" information to SPAGANLO for several years, and that Canton, Ohio, bookmaker, GEORGE FLOREA, is in frequent contact with both RAYMOND PAUL VARA in Las Vegas, and JOSEPH SPAGANLO or his partner in Cleveland, Ohio. Further, Source Four advised that through conversations as recently as the week of September 22, 1972, with FLOREA, Source learned that FLOREA is utilizing his home telephones, (216) 453-6114 and 452-1624, for his bookmaking activities.

Source Four advised on October 3, 1972, that from conversations with NELLO RONCI as well as with other bookmakers who bet with JOE SPAGANLO, that JOSEPH SPAGANLO until recently utilized telephone number (216) 221-3880, Cleveland, Ohio, in connection with his bookmaking activities; however, this number was recently changed.

Source Four advised on October 3, 1972, that from conversations with bookmakers who "lay off" to and exchange wagering information with JOE SPAGANLO

that SPAGANLO's partner handles the telephone booking operation, and that this is the individual being contacted by GEORGE FLOREA to exchange wagering information.

Concerning NELLO A. RONCI, who has admitted to Source Four as recently as the week ending October 31, 1972, that he was a bookmaker:

NELLO A. RONCI was indicted by a Federal Grand Jury in Cleveland, Ohio, on April 2, 1970, on seven counts of violations of Title 18, United States Code, Sections 1952 and 371. On May 21, 1971, I. RONCI entered a plea of guilty in United States District Court to violating seven counts of Title 18, United States Code, Section 371, conspiracy to violate Section 1952, and was sentenced by United States District Judge THOMAS D. LAMBORS to five years probation and $7,500 fine. On May 25, 1971, RONCI also entered a plea of guilty under Rule 20 to a violation of Title 18, United States Code, Section 1084. This plea was entered because of an indictment returned by a United States Federal Grand Jury in Buffalo, New York, on May 25, 1971. RONCI was sentenced to five years probation which ran concurrently with the above-mentioned sentence. The above-mentioned case is the same case mentioned on pages 45 and 46 of this affidavit in which JOSEPH ANTHONY SPAGANLO and RAYMOND PAUL VARA were convicted of violations of Title 18, United States Code, Section 371.

Source Four advised on October 11, 1972, that from conversations with bookmakers who associate with SPAGANLO, including NELLO RONCI, source learned that SPAGANLO's partner is AL KOTOCH, and that SPAGANLO and KOTOCH continue to operate a bookmaking operation in conjunction with RAYMOND VARA, who provides wagering information to SPAGANLO's bookmaking operation from Las Vegas, Nevada.

On October 24, 1972, Source Four advised that source personally knows through source's personal association with such bookmakers as NELLO RONCI and GEORGE FLOREA that Youngstown, Canton, and most of north-

eastern Ohio bookmakers depend upon the JOSEPH SPAGANLO bookmaking operation to relay the current out-of-state sports "line" which is being provided daily to SPAGANLO from Las Vegas, Nevada, by RAYMOND PAUL VARA.

Source Four advised on November 9, 1972, that the source learned from conversations as recently as November 6, 1972, with GEORGE FLOREA, who lays off to SPAGANLO, that VARA currently utilizes pay telephones at various gambling casinos in Las Vegas, Nevada, to make his calls, inasmuch as VARA is attempting to conceal his activities from law enforcement officials. Source Four advised that from conversations with FLOREA, source learned that RAYMOND VARA continues to call JOSEPH SPAGANLO's girl friend, who source knows to be SUZANNE VERES, on a daily basis at her residence, and furnish the "line" information. Source advised that SUZANNE VERES then relays this "line" information on to AL KOTOCH. Source Four stated that the source knows from conversations with FLOREA as recently as November 6, 1972, that JOSEPH SPAGANLO is reluctant to handle any telephone calls concerning "line" information himself because he fears Federal prosecution if he is caught. Source Four advised that GEORGE FLOREA told source as recently as November 5, 1972, that he continues utilizing his home telephones, 453-6114, and 452-1624, for booking and occasionally obtaining "line" information from RAYMOND VARA in Las Vegas, Nevada. Source Four further advised that FLOREA is still obtaining his daily "line" information from JOSEPH SPAGANLO's operation in the Cleveland, Ohio, area, and on occasion FLOREA will also provide the "line" information to SPAGANLO.

g. Source Number Five hereinafter referred to as Source Five, has been a source of the Cleveland Division of the Federal Bureau of Investigation for at least eight years and has provided information concerning gambling activities which has been corroborated by Special Agents of the FBI on at least fifteen different occasions, and which has led directly to the conviction in Federal Court of at least twelve gambling figures since 1969. Source

Five personally knows of the activities of AL KOTOCH and JOSEPH SPAGANLO through the fact that source personally wagers with AL KOTOCH. Sources Five advised on November 9, 1972, that through conversations with AL KOTOCH as recently as November 5, 1972, Source Five has learned that AL KOTOCH operates in conjunction with JOE SPAGANLO as bookmakers. Source Five further advised that during conversations with AL KOTOCH as recently as November 5, 1972, and through wagers which Source Five personally placed with AL KOTOCH as recently as November 5, 1972, that Source knows AL KOTOCH is currently utilizing phone number (216) 777-0850.

h) On November 17, 1972 Source One personally advised affiant that Source One had learned as recently as the week ending November 17, 1972, through conversations with AL KOTOCH and JOSEPH SPAGANLO, that AL KOTOCH is still in his bookmaking operation and further, that ERNEST CHICKENO is working, or continues to work for AL KOTOCH in KOTOCH's bookmaking activities. Source One advised Affiant on November 17, 1972, that all information previously related by the Source to Special Agents of the FBI, as set forth in this affidavit, is true and correct.

i) On November 20, 1972, Source Four personally related to affiant that the Source has learned through conversations with NELLO RONCI and GEORGE FLOREA as recently as the week ending November 19, 1972, that JOSEPH SPAGANLO and his partner, AL KOTOCH continue their bookmaking operations in the Cleveland, Ohio, area. Further, Source Four advised affiant that during the course of conversations with FLOREA and RONCI, as recently as the week ending November 19, 1972, Source has learned that RAYMOND PAUL VARA continues to exchange wagers and line information with FLOREA and continues to provide daily line information to JOSEPH SPAGANLO's girl friend, SUZANNE VERES at her residence. Source knows from conversations with FLOREA as recently as November 19, 1972, that FLOREA continues to utilize his home telephones number 453-6114 and 452-1624 for accepting wagers and

occasionally obtaining "line information" from RAYMOND PAUL VARA in Las Vegas. Nevada. Source personally advised affiant on November 20, 1972, that all information previously related by the source to Special Agents of the FBI as set forth in this affidavit, is true and correct.

j) On November 17, 1972, Source Number Five personally advised affiant that as recently as the week ending November 17. 1972, that the source has personally placed wagers with AL KOTOCH by calling KOTOCH at telephone number (216) 777-0850 and talking to KOTOCH. Source Five advised affiant on November 17, 1972, that all information which the Source has previously related to Special Agents of the FBI is true and correct.

k. On November 27, 1972, Source One personally advised affiant that Source One learned as recently as the week ending November 26, 1972, through conversations with AL KOTOCH and JOSEPH SPAGANLO, that AL KOTOCH is continuing his bookmaking operation. Source One advised that through conversations with AL KOTOCH and JOSEPH SPAGANLO as recently as the week ending November 26, 1972, that ERNEST CHICKENO continues to work for AL KOTOCH's bookmaking operation.

l. On November 27, 1972, Source Four personally related to affiant that through conversations with NELLO RONCI and GEORGE FLOREA as recently as the week ending November 26, 1972, that source learned that JOSEPH SPAGANLO and his partner, AL KOTOCH are still operating as bookmakers in the Cleveland, Ohio, area. Source Four further advised affiant that the Source has learned as recently as November 27, 1972, that RAYMOND PAUL VARA is exchanging line information and wagers with GEORGE FLOREA and continues to provide daily line information through JOSEPH SPAGANLO's girl friend, SUZANNE VERES, at her residence in North Ridgeville, Ohio. Source has learned through conversations with FLOREA as recently as the week ending November 26, 1972, that FLOREA continues to utilize his home telephones numbered 453-6114

and 452-1624 for accepting wagers and obtaining line information from RAYMOND VARA in Las Vegas, Nevada.

m. On November 27, 1972, Source Five personally advised affiant as recently as the week ending November 26, 1972, that the source has knowledge that AL KOTOCH is bookmaking, inasmuch as Source has personally placed wagers with AL KOTOCH at telephone number 216-777-0850 as recently as the week ending November 26, 1972.

GEORGE FLOREA
RAYMOND PAUL VARA

B. Source of information have been contacted by Special Agents of the Federal Bureau of Investigation who have in turn related to affiant all the information set forth herein:

On September 29, 1971, Source Four advised that through conversations with GEORGE FLOREA, source has learned that RAYMOND VARA is furnishing sports "line" information from inside the State of Nevada to GEORGE FLOREA and JOE SPAGANLO for use in their bookmaking activities.

On December 3, 1971, Source Four advised that through conversations with GEORGE FLOREA that the telephone number which SPAGANLO is currently utilizing in connection with his bookmaking activities is (216) 221-3880.

A review of the toll records of the Ohio Bell Telephone Company on September 21, 1972, by Special Agents of the FBI indicated that (216) 221-3880 was listed to ERNEST CHICKENO, Apartment 1621, 12900 Lake Avenue, Lakewood, Ohio. Records also show that this number was disconnected as of this date and no replacement telephone was re-issued. Records further reflect that telephone number (216) 228-1495 is listed to ERNEST CHICKENO at the above address.

Source Four advised on September 22, 1972, that through conversations with GEORGE FLOREA source has learned that GEORGE FLOREA, Canton, Ohio, tele-

phonically contacts JOE SPAGANLO in Cleveland, Ohio, and exchanges wagering information.

Source Four advised further on September 22, 1972, that source learned through conversations with NELLO RONCI, who has admitted to source as recently as September 22, that he is a bookmaker, and who bets with SPAGANLO, that SPAGANLO and his partner, whose name was not fully known to source as of September 22, 1972, are operating in the Cleveland, Ohio, area, as bookmakers, and continue to be in daily contact with RAYMOND VARA in Las Vegas, Nevada. The source advised that the purpose of these telephone calls is to exchange "line" information. Source Four further stated that during the course of a conversation with FLOREA, the source learned that VARA contacts SPAGANLO or his girlfriend, SUZANNE VERES, in the Cleveland, Ohio, area daily at approximately 11:45 a.m., and the "line" is furnished for use in SPAGANLO's daily bookmaking operation in the Cleveland area.

Source Four advised on September 22, 1972, that the source personally knows from conversations with GEORGE FLOREA, that VARA has furnished "line" information to SPAGANLO for several years, and that Canton, Ohio, bookmaker, GEORGE FLOREA, is in frequent contact with both RAYMOND PAUL VARA in Las Vegas, and JOSEPH SPAGANLO or his partner in Cleveland, Ohio. Further, Source Four advised that through conversations as recently as the week of September 22, 1972, with FLOREA, Source learned that FLOREA is utilizing his home telephones, (216) 453-6114 and 452-1624, for his bookmaking activities.

Source Four advised on October 3, 1972, that from conversations with NELLO RONCI as well as with other bookmakers who bet with JOE SPAGANLO, that JOSEPH SPAGANLO until recently utilized telephone number (216) 221-3880, Cleveland, Ohio, in connection with his bookmaking activities; however, this number was recently changed.

Source Four advised on October 3, 1972, that from conversations with bookmakers who "lay off" to and exchange wagering information with JOE SPAGANLO

that SPAGANLO's partner handles the telephone booking operation, and that this is the individual being contacted by GEORGE FLOREA to exchange wagering information.

Concerning NELLO A. RONCI, who has admitted to Source Four as recently as the week ending October 31, 1972, that he was a bookmaker:

NELLO A. RONCI was indicted by a Federal Grand Jury in Cleveland, Ohio, on April 2, 1970, on seven counts of violations of Title 18, United States Code, Sections 1952 and 371. On May 21, 1971, RONCI entered a plea of guilty in United States District Court to violating seven counts of Title 18, United States Code, Section 371, conspiracy to violate Section 1952, and was sentenced by United States District Judge THOMAS D. LAMBROS to five years probation and $7,500 fine. On May 25, 1971, RONCI also entered a plea of guilty under Rule 20 to a violation of Title 18, United States Code, Section 1084. This plea was entered because of an indictment returned by a United States Federal Grand Jury in Buffalo, New York, on May 25, 1971. RONCI was sentenced to five years probation which ran concurrently with the above-mentioned sentence. The above-mentioned case is the same case mentioned on pages 45 and 46 of this affidavit in which JOSEPH ANTHONY SPAGANLO and RAYMOND PAUL VARA were convicted of violations of Title 18, United States Code, Section 371.

Source Four advised on October 11, 1972, that from conversations with bookmakers who associate with SPAGANLO, including NELLO RONCI, source learned that SPAGANLO's partner is AL KOTOCH, and that SPAGANLO and KOTOCH continue to operate a bookmaking operation in conjunction with RAYMOND VARA, who provides wagering information to SPAGANLO's bookmaking operation from Las Vegas, Nevada.

On October 24, 1972, Source Four advised that source personally knows through source's personal association with such bookmakers as NELLO RONCI and GEORGE FLOREA that Youngstown, Canton, and most of north-

eastern Ohio bookmakers depend upon the JOSEPH SPAGANLO bookmaking operation to relay the current out-of-state sports "line" which is being provided daily to SPAGANLO from Las Vegas, Nevada, by RAYMOND PAUL VARA.

Source Four advised on November 9, 1972, that the source learned from conversations as recently as November 6, 1972, with GEORGE FLOREA, who lays off to SPAGANLO, that VARA currently utilizes pay telephones at various gambling casinos in Las Vegas, Nevada, to make his calls, inasmuch as VARA is attempting to conceal his activities from law enforcement officials. Source Four advised that from conversations with FLOREA, source learned that RAYMOND VARA continues to call JOSEPH SPAGANLO's girl friend, who source knows to be SUZANNE VERES, on a daily basis at her residence, and furnish the "line" information. Source advised that SUZANNE VERES then relays this "line" information on to AL KOTOCH. Source Four stated that the source knows from conversations with FLOREA as recently as November 6, 1972, that JOSEPH SPAGANLO is reluctant to handle any telephone calls concerning "line" information himself because he fears Federal prosecution if he is caught. Source Four advised that GEORGE FLOREA told source as recently as November 5, 1972, that he continues utilizing his home telephones, 453-6114, and 452-1624, for booking and occasionally obtaining "line" information from RAYMOND VARA in Las Vegas, Nevada. Source Four further advised that FLOREA is still obtaining his daily "line" information from JOSEPH SPAGANLO's operation in the Cleveland, Ohio, area, and on occasion FLOREA will also provide the "line" information to SPAGANLO.

On November 20, 1972, Source Four personally related to affiant that the Source has learned through conversations with NELLO RONCI and GEORGE FLOREA as recently as the week ending November 19, 1972, that JOSEPH SPAGANLO and his partner, AL KOTOCH continue their bookmaking operations in the Cleveland, Ohio, area. Further, Source Four advised affiant that during the course of conversations with FLOREA and

RONCI, as recently as the week ending November 19, 1972, Source has learned that RAYMOND PAUL VARA continues to exchange wagers and line information with FLOREA and continues to provide daily line information to JOSEPH SPAGANLO's girl friend, SUZANNE VERES at her residence. Source knows from conversations with FLOREA as recently as November 19, 1972, that FLOREA continues to utilize his home telephones number 453-6114 and 452-1624 for accepting wagers and occasionally obtaining "line information" from RAYMOND PAUL VARA in Las Vegas, Nevada. Source personally advised affiant on November 20, 1972, that all information previously related by the source to Special Agents of the FBI as set forth in this affidavit, is true and correct.

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SUZANNE VERES

C. Sources of information have been contacted by Special Agents of the FBI, who have in turn related to affiant all the information set forth herein:

On September 29, 1971, Source Four advised that through conversations with GEORGE FLOREA, source has learned that RAYMOND VARA is furnishing sports "line" information from inside the State of Nevada to GEORGE FLOREA and JOE SPAGANLO for use in their bookmaking activities.

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Source Four advised on September 22, 1972, that the source personally knows from conversations with GEORGE FLOREA, that VARA has furnished "line" information to SPAGANLO for several years, and that Canton, Ohio, bookmaker, GEORGE FLOREA, is in frequent contact with both RAYMOND PAUL VARA in Las Vegas, and JOSEPH SPAGANLO or his partner in Cleveland, Ohio. Further, Source Four advised that through conversations as recently as the week of September 22, 1972, with FLOREA, Source learned that FLOREA is utilizing his home telephones, (216) 453-6114 and 452-1624, for his bookmaking activities.

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Source Four advised on October 3, 1972, that from conversations with bookmakers who "lay off" to and exchange wagering information with JOE SPAGANLO that SPAGANLO's partner handles the telephone booking operation, and that this is the individual being contacted by GEORGE FLOREA to exchange wagering information.

Concerning NELLO A. RONCI, who has admitted to Source Four as recently as the week ending October 31, 1972, that he was a bookmaker:

NELLO A. RONCI was indicted by a Federal Grand Jury in Cleveland, Ohio, on April 2, 1970, on seven counts of violations of Title 18, United States Code, Sections 1952 and 371. On May 21, 1971, RONCI entered a plea of guilty in United States District Court to violating seven counts of Title 18, United States Code, Section 371, conspiracy to violate Section 1952, and was sentenced by United States District Judge THOMAS D. LAMBROS to five years probation and $7,500 fine. On May 25, 1971, RONCI also entered a plea of guilty under Rule 20 to a violation of Title 18, United States Code, Section 1084.

This plea was entered because of an indictment returned by a United States Federal Grand Jury in Buffalo, New York, on May 25, 1971. RONCI was sentenced to five years probation which ran concurrently with the above-mentioned sentence. The above-mentioned case is the same case mentioned on pages 45 and 46 of this affidavit in which JOSEPH ANTHONY SPAGANLO and RAYMOND PAUL VARA were convicted of violations of Title 18, United States Code, Section 371.

Source Four advised on October 11, 1972, that from conversations with bookmakers who associate with SPAGANLO, including NELLO RONCI, source learned that SPAGANLO's partner is AL KOTOCH, and that SPAGANLO and KOTOCH continue to operate a bookmaking operation in conjunction with RAYMOND VARA, who provides wagering information to SPAGANLO's bookmaking operation from Las Vegas, Nevada.

On October 24, 1972, Source Four advised that source personally knows through source's personal association with such bookmakers as NELLO RONCI and GEORGE FLOREA that Youngstown, Canton, and most of northeastern Ohio bookmakers depend upon the JOSEPH SPAGANLO bookmaking operation to relay the current out-of-state sports "line" which is being provided daily to SPAGANLO from Las Vegas, Nevada, by RAYMOND PAUL VARA.

Source Four advised on November 9, 1972, that the source learned from conversations as recently as November 6, 1972, with GEORGE FLOREA, who lays off to SPAGANLO, that VARA currently utilizes pay telephones at various gambling casinos in Las Vegas, Nevada, to make his calls, inasmuch as VARA is attempting to conceal his activities from law enforcement officials. Source Four advised that from conversations with FLOREA, source learned that RAYMOND VARA continues to call JOSEPH SPAGANLO's girl friend, who source knows to be SUZANNE VERES, on a daily basis at her residence, and furnish the "line" information. Source advised that SUZANNE VERES then relays this "line" information on to AL KOTOCH. Source Four stated that the source knows from conversations with

FLOREA as recently as November 6, 1972, that JOSEPH SPAGANLO is reluctant to handle any telephone calls concerning "line" information himself because he fears Federal prosecution if he is caught. Source Four advised that GEORGE FLOREA told source as recently as November 5, 1972, that he continues utilizing his home telephones, 453-6114, and 452-1624, for booking and occasionally obtaining "line" information from RAYMOND VARA in Las Vegas, Nevada. Source Four further advised that FLOREA is still obtaining his daily "line" information from JOSEPH SPAGANLO's operation in the Cleveland, Ohio, area, and on occasion FLOREA will also provide the "line" information to SPAGANLO.

On November 20, 1972, Source Four personally related to affiant that the Source has learned through conversations with NELLO RONCI and GEORGE FLOREA as recently as the week ending November 19, 1972, that JOSEPH SPAGANLO and his partner, AL KOTOCH continue their bookmaking operations in the Cleveland, Ohio, area. Further, Source Four advised affiant that during the course of conversations with FLOREA and RONCI, as recently as the week ending November 19, 1972, Source has learned that RAYMOND PAUL VARA continues to exchange wagers and line information with FLOREA and continues to provide daily line information to JOSEPH SPAGANLO's girl friend, SUZANNE VERES at her residence. Source knows from conversations with FLOREA as recently as November 19, 1972, that FLOREA continues to utilize his home telephones number 453-6114 and 452-1624 for accepting wagers and occasionally obtaining "line information" from RAYMOND PAUL VARA in Las Vegas, Nevada. Source personally advised affiant on November 20, 1972, that all information previously related by the source to Special Agents of the FBI as set forth in this affidavit, is true and correct.

On November 27, 1972, Source Four personally related to affiant that through conversations with NELLO RONCI and GEORGE FLOREA as recently as the week ending November 26, 1972, that source learned that JOSEPH SPAGANLO and his partner, AL KOTOCH are still op-

erating as bookmakers in the Cleveland, Ohio, area. Source Four further advised affiant that the Source has learned as recently as November 27, 1972, that RAYMOND PAUL VARA is exchanging line information and wagers with GEORGE FLOREA and continues to provide daily line information through JOSEPH SPAGANLO's girl friend, SUZANNE VERES, at her residence in North Ridgeville, Ohio. Source has learned through conversations with FLOREA as recently as the week ending November 26, 1972, that FLOREA continues to utilize his home telephones numbered 453-6114 and 452-1624 for accepting wagers and obtaining line information from RAYMOND VARA in Las Vegas, Nevada.

2. CRIMINAL RECORDS FOR THOSE ABOVE PERSONS

AL KOTOCH

a) Criminal records of the FBI and the Cleveland Police Department, Cleveland, Ohio, were searched by Special Agents of the FBI, who in turn related the following results to the affiant:

On January 8, 1972, the records of the Cleveland Police Department, Cleveland, Ohio, were reviewed concerning AL KOTOCH and the following information was obtained:

AL KOTOCH, date of birth June 13, 1928, was arrested by the Cleveland Police Department, Cleveland, Ohio, on March 21, 1957, on a "gambling charge." He was released after signing a "Suspicious Person" waiver.

The records of the Cleveland, Ohio, Police Department further reflect that on October 10, 1965, AL KOTOCH was arrested in connection with "illegal football wagers". The records reveal that there was insufficient evidence to hold KOTOCH, and he was released after signing a "Suspicious Person" waiver.

On December 12, 1970, duly authorized search warrants for the person of AL KOTOCH and the premises, at which he resided, Apartment 1005, 12000 Edgewater Drive, Lakewood, Ohio, were executed by Special Agents

of the FBI in connection with a nation-wide gambling case being investigated by the FBI in Los Angeles, California. During the execution of the above-described search warrants for the person of AL KOTOCH and his premises at Apartment 1005, 12000 Edgewater Drive, Lakewood, Ohio, Special Agents of the FBI seized football parlay cards, football schedules, betting sheets with notations upon them, $5,210 in cash currency and $13,900 in checks. (Six checks totaling $7,600 were made by SHELDON JAFFE—See page 5 of this affidavit concerning JAFFE.) This case is currently pending in the United States District Courts, Los Angeles, California.

JOSEPH SPAGANLO

B. Criminal records of the FBI and the Cleveland Police Department, Cleveland, Ohio, were searched by Special Agents of the FBI, who in turn related the following results to affiant:

Identification Records of the FBI on JOE SPAGANLO reflect that SPAGANLO was arrested in Cleveland, Ohio, on August 27, 1959, for possession of gambling devices. The disposition on this charge was a $100 fine and costs.

JOSEPH ANTHONY SPAGANLO was arrested on April 6, 1970, for violation of Title 18, United States Code, Sections 1952, 2, and 371, Interstate Transportation in Aid of Racketeering—Gambling and Conspiracy. SPAGANLO entered a plea of guilty to the above charges in the United States District Court, Northern District of Ohio, on April 19, 1971, and was sentenced to five years probation and fined $5,000 on April 19, 1971. SPAGANLO is currently on probation.

On April 19, 1971, JOSEPH ANTHONY SPAGANLO further entered a plea of guilty in United States District Court, Cleveland, Ohio, under Rule 20, to an indictment returned on December 10, 1970, by United States Federal Grand Jury, Newark, New Jersey, charging SPAGANLO, with violation of Title 18, United States Code, Sections 1952, 1084, and 371. SPAGANLO was sentenced on April 19, 1971, to five years probation and $10,000 fine,

the probation to run concurrently with the Cleveland, Ohio, sentence.

Previous investigation in the above-mentioned case, which resulted in SPAGANLO's arrest on April 6, 1970, by Special Agents of the FBI, who in turn related the results of their investigation to affiant, show that SPAGANLO spends a great deal of time with SUZANNE VERES, who currently resides at 4958 Gate Moss Oval, North Ridgeville, Ohio.

ERNEST CHICKENO

C. Criminal records of the FBI and the Cleveland Police Department, Cleveland, Ohio, were searched by Special Agents of the FBI, and it was determined that no records could be found concerning ERNEST CHICKENO.

On October 2, 1972, a review of the Law Enforcement Automated Data System (LEADS) by affiant showed the following driver's license information for ERNEST CHICKENO: White, male, date of birth June 28, 1933. Of September 18, 1970, LEADS reveal that CHICKENO's address was 12520 Edgewater, Lakewood, Ohio. CHICKENO was described as: Brown hair, brown eyes, 5'7", 165 pounds, Social Security Number 269-28-0072.

Investigation by Special Agents of the FBI show CHICKENO's current address is Apartment 1621, 12900 Lake Avenue, Lakewood, Ohio.

RAYMOND PAUL VARA

D. Criminal records of the FBI and the Cleveland Police Department, Cleveland, Ohio, were searched by Special Agents of the FBI, who in turn related the following results to the affiant:

RAYMOND PAUL VARA, FBI Number 310 426 H, was arrested by the Youngstown Police Department, Youngstown, Ohio, on April 12, 1963; the charge was "Suspicion". Disposition was investigation and released.

On April 6, 1970, RAYMOND PAUL VARA was arrested and turned over to the United States Marshal's Office in Reno, Nevada, on a charge of Interstate Transportation of Gambling Equipment. No disposition was shown.

On April 6, 1970, RAYMOND PAUL VARA was arrested by the Sheriff's Office, Las Vegas, Nevada, on a charge of Interstate Transportation in Aid of Racketeering—Gambling. No disposition was shown.

RAYMOND VARA was arrested by the FBI on April 12, 1970 for violation of Title 18, Section 1952, Title 18, Section 371, Conspiracy—Interstate Transportation in Aid of Racketeering—Gambling. VARA pled guilty in United States District Court, Cleveland, Ohio, to the above charges, and on April 19, 1971, was sentenced to five years probation and $5,000. VARA is currently on probation. (This is in connection with the same case in which JOSEPH ANTHONY SPAGANLO also pled guilty for violation of Title 18, Section 371. See Page 45 of this affidavit.)

GEORGE M. FLOREA

E. On October 3, 1972, the Record Bureau of the Canton, Ohio, Police Department, made available to the affiant a Federal Bureau of Investigation arrest record of GEORGE FLOREA, FBI Number 28 88 609.

Canton, Ohio, Police Department records show FLOREA as a white male, date of birth August 28, 1920, in Canton, Ohio. FLOREA's arrest record dates back to May 7, 1940, when he was arrested for "illegal train riding" through March 25, 1969. Arrests were primarily as follows:

On April 7, 1944, GEORGE M. FLOREA was arrested by the Canton Police Department, Canton, Ohio, on "Suspicion of Breaking and Larceny."

On June 26, 1944, FLOREA was sentenced to 1-15 years in the Ohio State Penitentiary.

On March 19, 1959, FLOREA was arrested by the United States Marshal's Office, Cleveland, Ohio, on a

charge of passing counterfeit money. FLOREA was found not guilty November 19, 1959.

On September 17, 1960, FLOREA was arrested by the Police Department in Sharon, Pennsylvania, for burglary and was sentenced to 18 years in the Western Penitentiary.

Investigation by Special Agents of the FBI reveal that FLOREA currently resides at 204 Broad Avenue, Northwest, Canton, Ohio.

SUZANNE VERES

F. Criminal records of the FBI and the Cleveland Police Department, Cleveland, Ohio, were searched by Special Agents of the FBI, and no records could be located concerning SUZANNE VERES.

Previous investigation by Special Agents of the FBI in connection with JOE SPAGANLO concerning violation of Title 18, Section 1952, has disclosed that JOE SPAGANLO maintains a close relationship with SUZANNE VERES, who currently resides at 4958 Gate Moss Oval, North Ridgeville, Ohio.

3. SURVEILLANCES ESTABLISHING CONTACT OF AL KOTOCH, JOSEPH SPAGANLO, ERNEST CHICKENO WITH ONE ANOTHER, AND WITH SUZANNE VERES

A. The following surveillances of AL KOTOCH were conducted by affiant and other Special Agents of the FBI, concerning ALBERT KOTOCH, JOSEPH A. SPAGANLO, ERNEST L. CHICKENO, GEORGE FLOREA, RAYMOND PAUL VARA, and SUZANNE VERES, in early March, 1972, through October, 1972, with the following results:

On March 17, 1972, Special Agents of the FBI observed AL KOTOCH and JOE SPAGANLO in the company of two other unknown white males seated at a table in the Theatrical Restaurant, 711 Vincent Street, Cleveland. On this date, AL KOTOCH was driving a black Cadillac,

bearing 1971 Ohio license (1) 4269, an Ohio automobile dealer's license plate. A review of Law Enforcement Automated Data System by Special Agents of the FBI, show this plate registered to Dealer's Outlet, Inc., 27105 Lorain Road, North Olmsted, Ohio.

On June 2, 1972, AL KOTOCH was observed by Special Agents of the FBI driving a dark brown over light Oldsmobile bearing 1972 Ohio license (45) 2864, which was an Ohio automobile dealer's license plate.

A review of the Law Enforcement Automated Data System, hereinafter referred to as LEADS, reveals dealer's license 2864 is listed to Dealer's Outlet, Inc., 27105 Lorain Road, North Olmsted, Ohio.

On June 8, 1972, AL KOTOCH was observed by Special Agents of the FBI driving a white Buick Electra, two door hardtop, with 1972 Ohio license (45) 2864, which is an Ohio automobile dealer's license plate. KOTOCH was observed on this date entering the Carlyle Apartment Building, 12900 Lake Avenue, Lakewood, Ohio. KOTOCH parked his automobile in the basement garage which he gained access to through the use of an electronic key lock which prior investigation revealed is normally issued only to occupants of Carlyle Apartments.

On June 9, 1972, AL KOTOCH was observed driving a white Buick Electra 225 bearing 1972 Ohio license plate (45) 2864. KOTOCH was again observed entering the Carlyle Apartments.

On September 12, 1972, it was noted that a two-tone brown late model Cadillac El Dorado, bearing 1972 Ohio dealer's plates (27) 2864, was parked in an apartment complex at 25151 Brookpark Road, North Olmsted, Ohio. This automobile was observed by Special Agents of the FBI to have been driven recently by AL KOTOCH.

On September 11, 1972, at 10:24 AM, the same two-tone brown Cadillac convertible as mentioned above, bearing dealer's plates (27) 2864, and occupied by AL KOTOCH and an unknown white male described as 5'8", 180 pounds, with long brown hair, arrived in the parking lot at 25151 Brookpark Road, North Olmsted, Ohio. AL KOTOCH departed the automobile and went into the

apartment at 25151 Brookpark Road, and the unknown white male departed in KOTOCH's automobile.

On September 13, 1972, at 9:50 AM, affiant observed a two-tone Cadillac El Dorado bearing Ohio license (27) 2864 parked in the parking lot of the apartment complex at 25151 Brookpark Road, North Olmsted, Ohio, at 11:22 AM. Upon approaching the door at Apartment 512 at 25151 Brookpark Road, North Olmsted, Ohio, affiant heard the sound of conversation from within the apartment. One male voice identified by affiant as that of AL KOTOCH was talking, "Pittsburgh over (*Unintelligible*) (*Unintelligible*), over (*Unintelligible*)," "several numbers, and 2 for 5." Then (*Unintelligible*) "over Kent." "25 gees less two." "90 dollars?" Affiant observed AL KOTOCH departing in the above-mentioned Cadillac from the apartment house at 25151 Brookpark Road, North Olmsted, Ohio, at approximately 2:31 PM, September 13, 1972. No other individuals were observed to use Apartment 512 during the course of the surveillance.

On September 20, 1972, AL KOTOCH was observed departing from the front area of Carlyle Apartments, 12900 Lake Avenue, Lakewood, Ohio, at 10:30 AM, driving a two-tone blue late model Ford Thunderbird, bearing Ohio license (11) 2864. At 1:00 PM, the above-mentioned Thunderbird was noted in the parking lot at 25151 Brookpark Road, North Olmsted, Ohio. A Special Agent of the FBI advised affiant that he stopped at the door of Apartment 512 and heard a male voice calling out a series of small numbers. At 2:40 PM, September 20, 1972, AL KOTOCH was observed leaving Apartment 512. No other individuals were noted at the apartment during the time of the surveillance and subsequent to KOTOCH's departure from Apartment 512, Special Agents of the FBI rang the doorbell of the apartment and no one responded.

A series of spot checks by affiant from September 13, 1972, to October 9, 1972, at Apartment 512 at 25151 Brookpark Road, North Olmsted, Ohio, during odd hours of the evening and on weekends have disclosed to affiant that when AL KOTOCH is not known to be present at Apartment 512, there appears to be no other occupant at Apartment 512.

On September 22, 1972, at 9:28 AM, AL KOTOCH was observed by Special Agents of the FBI in a two-tone Thundrebird as described above bearing dealer's plate (11) 2864, which was parked in the parking lot at 25151 Brookpark Road, North Olmsted, Ohio, and was seen by Special Agents of the FBI departing the automobile and enter 25151 Brookpark Road. Later checks by Special Agents of the FBI at Apartment 512, 25151 Brookpark Road, revealed a male voice from within the apartment calling off a series of small numbers. At 1:45 PM, September 22, 1972, Special Agents of the FBI observed AL KOTOCH depart Apartment 512. Special Agents of the FBI rang the doorbell of the apartment subsequent to KOTOCH's departure and there was no answer. KOTOCH was observed by Special Agents to proceed directly from 25151 Brookpark Road to Dealer's Outlet, Inc., Auto Sales, 27105 Lorain Road, North Olmsted, Ohio, and KOTOCH was later observed by Special Agents of the FBI in the company of JOE SPAGANLO.

On September 25, 1972, AL KOTOCH was observed by Special Agents of the FBI to park in the parking lot at 25151 Brookpark Road, North Olmsted, Ohio, at 10:41 AM, and was observed to proceed into Apartment 512. A spot check by Special Agents of the FBI on this date determined that KOTOCH's two-tone blue Thunderbird was still parked in the parking lot of 25151 Brookpark Road, North Olmsted, Ohio, at 1:01 PM.

At no time throughout the course of the above-mentioned surveillances did Special Agents of the FBI observe AL KOTOCH engaged in any activity which would indicate a place of steady employment other than Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio.

On October 15, 1972, at 12:02 PM, affiant observed a two-tone black, late model Cadillac, four-door sedan, bearing current Ohio license (2864), parked in the parking lot of 25151 Brookpark Road, North Olmsted, Ohio. This being the same automobile AL KOTOCH was observed in by affiant during the week of October 9, 1972, through October 13, 1972. Affiant approached the door to Apartment 512, and heard activity from within the apartment, that is, a radio and a male voice.

At 3:20 PM when affiant checked the parking lot at 25151 Brookpark Road, North Olmsted, Ohio, on October 15, 1972, the automobile described above was gone. No one responded when the affiant rang the doorbell at Apartment 512.

On October 10, 1972, October 11, 1972, October 15, 1972, and October 18, 1972, AL KOTOCH was observed by Special Agents of the FBI at 25151 Brookpark Road, North Olmsted, Ohio. Further on October 10, 1972, and October 19, 1972, AL KOTOCH was observed at the Dealer Outlet where he remained only a short time. On October 10, 1972, AL KOTOCH was observed in the company of JOE SPAGANLO.

B. The following surveillances of JOSEPH SPAGANLO were conducted by affiant and other Special Agents of the FBI from September 13, 1972, through October, 1972:

During the course of physical surveillances by Special Agents of the FBI on September 13, 1972, September 21, 1972, September 22, 1972, and September 25, 1972, SPAGANLO was observed in and out of Dealer's Outlet, Inc., 27105 Lorain Road, North Olmsted, Ohio, at various times during the day.

On September 21, 1972, and September 25, 1972, during the course of surveillances by Special Agents of the FBI, JOSEPH SPAGANLO was observed in the company of ERNEST CHICKENO at Noon, Dealer's Outlet, Inc., 27105 Lorain Road, North Olmsted, Ohio.

On September 22, 1972, during the course of surveillances by Special Agents of the FBI, SPAGANLO was observed in the company of AL KOTOCH at 1:49 PM.

On October 11, 1972, at 1:35 PM, Special Agents of the FBI observed JOE SPAGANLO in his black over gray late model Cadillac bearing dealer plates (2) 2864, at East 6th and Superior Avenue, Cleveland, Ohio. SPAGANLO's automobile was stopped by a traffic light. SPAGANLO was glancing at a copy of the Ohio State Sports News which had "line" information written upon it, as well as referring to an orange colored sports information sheet.

At no time during the above-mentioned surveillances of JOE SPAGANLO at Dealer's Outlet, 27105 Lorain, North Olmsted, Ohio, was SPAGANLO observed by Special Agents of the Federal Bureau of Investigation to be acting in the capacity of an employee, that is, showing used cars to customers or making auto sales.

C. Surveillances of Dealer's Outlet, 27105 Lorain Road, North Olmsted, Ohio, were conducted by Special Agents of the FBI with the following results:

Surveillances were conducted of Dealer's Outlet, Inc., 27105 Lorain, North Olmsted, Ohio, on September 13, 1972, September 18, 1972, September 22, 1972, and September 25, 1972, and October 5, 1972, revealing that JOE SPAGANLO generally entered Dealer's Outlet, Inc. around early afternoon and remained at Dealer's Outlet for most of the afternoon.

On September 18, 1972, ERNEST CHICKENO and AL KOTOCH were observed together in the vicinity of Dealer's Outlet, Inc., North Olmsted, Ohio.

On September 4, 1972, and September 18, 1972, AL KOTOCH was observed in the company of JOE SPAGANLO in the immediate vicinity of Dealer's Outlet, Inc., 27105 Lorain, North Olmsted, Ohio.

On September 22, 1972, and September 25, 1972, SUZANNE VERES was observed in the company of JOE SPAGANLO at Dealer's Outlet.

On September 25, 1972, it was noted that SUZANNE VERES arrived at Dealer's Outlet at 1:33 PM and went to an office located in the back of Dealer's Outlet, where she spent the afternoon until 4:10 PM when the surveillance was terminated.

On October 10, 1972, October 17, 1972, October 18, 1972, and October 19, 1972, a surveillance was conducted by Special Agents of the FBI on Dealer's Outlet, Inc., 27105 Lorain, North Olmsted, Ohio. During the surveillance, the following observations were made:

On October 10, 1972, JOE SPAGANLO was observed in the company of ERNEST CHICKENO.

On October 18, 1972, ERNEST CHICKENO was observed by Special Agents of the FBI to arrive at Dealer's Outlet at 11:02 AM and depart at 11:39 AM.

On October 19, 1972, AL KOTOCH was observed at Dealer's Outlet at 3:27 PM in the company of JOE SPAGANLO and AL KOTOCH was not observed leaving, nor was he observed at 2:30 PM on October 19, 1972, when a spot check was made.

On October 19, 1972, ERNEST CHICKENO was observed at Dealer's Outlet during morning hours, however, he was present only briefly. None of the above surveillances by Special Agents indicates that JOE SPAGANLO or ERNEST CHICKENO are actually employed at Dealer's Outlet selling autos.

D. Surveillances of ERNEST CHICKENO were conducted by Special Agents of the FBI, and affiant with the following results:

a) On September 18, 1972, and September 31, 1972, and October 4, 1972, ERNEST CHICKENO was observed by Special Agents of the FBI in the company of AL KOTOCH.

b) On September 21, 1972, and September 25, 1972, ERNEST CHICKENO was observed in the office of JOE SPAGANLO. On both occasions, CHICKENO was observed in the office of JOE SPAGANLO at Dealer's Outlet, Inc., 27105 Lorain Road, North Olmsted, Ohio.

c) Surveillances conducted on CHICKENO on September 13, 1972, September 19, 1972, September 21, 1972, indicate that ERNEST CHICKENO generally did not leave his apartment, Apartment 1621, 12900 Lake Avenue, Lakewood, Ohio, until sometime around early afternoon, that is, between Noon and 2 o'clock. Activities noted on various days were as follows:

On September 13, 1972, and September 19, 1972, CHICKENO left the apartment house at 12900 Lake, Lakewood, Ohio, at 12:50 PM. CHICKENO drove directly to the vicinity of 6710 Detroit and entered Lou's Furniture Store carrying a small handful of assorted papers. Lou's Furniture Store is owned and operated by LOUIS and SANFORD GLASSMAN, both of whom reside in Cleveland, Ohio, and both of whom are currently under indictment in Los Angeles, California, for violation of Title 18, Section 1084, United States Code

—Interstate Transportation of Wagering Information. Further, as a result of information provided by Special Agents of the FBI, who were investigating the gambling operation in Los Angeles, California, which involved LOUIS and SANFORD GLASSMAN, an affidavit for a search warrant for a search of AL KOTOCH and his premises at Apartment 1005, 12000 Edgewater, Lakewood, Ohio, was obtained with the results as set forth on page 24.

On both September 13, 1972, and September 19, 1972, CHICKENO remained in Lou's Furniture Store for only a few minutes.

On September 21, 1972, CHICKENO left his apartment at 12900 Lake, Lakewood, Ohio, at 1:25 PM and went to the Pyramid Cafe, 2637 Scranton Avenue, Cleveland, Ohio, where he entered carrying a handful of white envelopes.

The Pyramid Cafe, 2637 Scranton Avenue, is owned and operated by CHESTER OBLOCK, known through previous investigation by Special Agents of the FBI as an associate of gamblers and bookmakers in the Cleveland, Ohio, area, including JOE SPAGANLO.

On September 22, 1972, CHICKENO was observed by Special Agents of the FBI departing his Apartment, 1621, 12900 Lake Avenue, Lakewood, Ohio, at 1:10 PM and proceeding to Harvey's Hide-Away Lounge, 13915 Cedar Road, Shaker, Ohio. CHICKENO went into the lounge and remained for approximately one hour. Harvey's Hide-Away Lounge is known through previous investigation by Special Agents of the FBI as a popular meeting spot for gamblers and bookmakers in the Cleveland, Ohio, area.

At no time during the above-mentioned surveillances by Special Agents of the FBI, did CHICKENO appear to have any place of employment with which he was affiliated.

On October 10, 1972, JOE SPAGANLO was observed in the company of ERNEST CHICKENO.

On October 18, 1972, ERNEST CHICKENO was observed by Special Agents of the FBI to arrive at Dealer's Outlet at 11:02 AM and depart at 11:39 AM.

On October 19, 1972, ERNEST CHICKENO was observed at Dealer's Outlet during morning hours, however, he was present only briefly. None of the above surveillances by Special Agents indicates that JOE SPAGANLO or ERNEST CHICKENO are actually employed at Dealer's Outlet selling autos.

D. On September 29, 1972, Special Agents of the FBI conducted surveillances of RAYMOND VARA in Las Vegas and determined that VARA left his residence in the early morning hours, drove in his automobile in a circuitous route, and stopped at a public telephone after obvious attempts to lose any individual who was following him. Special Agents related to affiant that VARA placed a telephone call of some two minutes duration. Subpoenas issued to the Central Telephone Company, Las Vegas, Nevada, for the records of the public telephones VARA used to place calls show that VARA called telephone number 216/777-2238 in Westlake, Ohio, on September 29, 1972 for a duration of two minutes.

Records of the Ohio Bell Telephone Company, Cleveland, Ohio, reflect that telephone number 216/777-2238 is subscribed to People's Acceptance Corporation, 27105 Lorain. Haines Criss-Cross Directory for Cleveland, Ohio, and vicinity 1971, indicates that 27105 Lorain is the address for Dealer's Outlet, Inc., and People's Acceptance Corporation; the other telephone listed to this address is 777-7900.

During the course of the above-mentioned telephone call placed to 777-2238, VARA was overheard to say "Notre Dame . . ." and later "6½ and 7".

E. Surveillances of GEORGE FLOREA were conducted by Special Agents of the FBI with the following results:

On October 4, 1972, and October 5, 1972, GEORGE FLOREA was not observed leaving his house at 204 Broad Avenue, Northwest, Canton, Ohio, until early afternoon.

Surveillances conducted by Special Agents of the FBI on October 20, 1972, October 24, 1972, and October 25, 1972, reflect that FLOREA generally does not leave his residence until at least mid-afternoon. FLOREA's activ-

ities, upn departing his residence by automobile, show no usual destination or pattern in his movements.

F. Surveillances of SUZANNE VERES were conducted by Special Agents of the FBI with the following results:

On September 27, 1972, October 2, 1972, and October 3, 1972, surveillances conducted on SUZANNE VERES indicate that SUZANNE VERES was at her residence, 4958 Gate Moss Oval, North Ridgeville, Ohio, during the morning hours and would generally leave her residence around early afternoon if at all.

On September 22, 1972, September 25, 1972, September 29, 1972, and October 3, 1972, SUZANNE VERES was observed at various times in the company of JOE SPAGANLO, either with him in his automobile, or at her residence, or at Dealer's Outlet, Inc. 27105 Lorain Road, North Olmsted, Ohio.

4. TOLL RECORDS REFLECTING ACCURACY OF SOURCE INFORMATION CONCERNING ABOVE-NAMED PERSONS:

A) In connection with the telephone numbers allegedly used by AL KOTOCH, ERNEST CHICKENO, and JOE SPAGANLO for bookmaking activities, the toll records of the Ohio Bell Telephone Company, Cleveland, Ohio, were reviewed by affiant, and other Special Agents of the FBI who related the results of their investigation to affiant:

a) Toll records of the Ohio Bell Telephone Company for telephone number 216/228-1495 listed to ERNEST CHICKENO at Apartment 1621, 12900 Lake, Lakewood, Ohio, for the period of June 29, 1972, to July 28, 1972, reflect the following telephone calls:

Twenty-eight (28) calls during the above period were made from 216/228-1495 to 216/823-5922, and eight (8) telephone calls were made to 216/832-8602. Both called numbers are listed to Ohio State Sports News, 1379 Lincoln Way, Massillon, Ohio. These telephone calls were

all made in the late morning hours and at least one call was made each day.

The Ohio State Sports News is owned and operated by ROBERT COMBS, who is a self-admitted sports handicapper.

Two calls were made from 216/228-1495 in the early afternoon hours to Elyria, Ohio, telephone number 216/327-4193. Records of Elyria Telephone Company in Elyria, Ohio, show this telephone is listed to SUZANNE VERES at 4958 Gate Moss Oval in North Ridgeville, Ohio.

A total of 17 calls were made to Cincinnati, Ohio, telephone numbers 513/242-6664 and 513/242-9918. Investigation conducted by Special Agents of the FBI, Cincinnati, Ohio, who in turn related the results of their investigation to affiant, reveals that both telephones are utilized by VANIS RAY ROBBINS, 320-322 Locust Street, Cincinnati, Ohio. ROBBINS is currently under indictment in Cincinnati for violation of Federal gambling laws, Title 18, United States Code, Sections 1952, 1084, and 371.

Thirty-four (34) telephone calls were made to Youngstown, Ohio, telephone number 216/792-3822. Previous investigation by Special Agents of the FBI indicated that telephone number 216/792-3822 is listed to TONY CHESINO, 10 Idlewood, Apartment 302. Investigation by Special Agents of the FBI reveals that TONY CHESINO is an alias used by one DOMINIC BUZZACO who is known from previous investigation by Special Agents of the FBI to be a bookmaker.

Thirty-three (33) telephone calls were made from 216/228-1495 to Youngstown, Ohio, to telephone number 216/759-9594. Records of the Ohio Bell Telephone Company reflect that this number is listed to CHARLES MOORE, 1198 Will-o-Wood Drive, Liberty Township, Ohio. CHARLES MOORE has been previously convicted for violation of Federal gambling laws.

In the same case as involved JOSEPH ANTHONY SPAGANLO and RAYMOND PAUL VARA, for violation of Title 18, Sections 1952, 2, and 371, CHARLES MOORE pled guilty to the above charges in United

States District Court, Cleveland, Ohio, on April 19, 1971, and received five years probation and was fined $5,000.

b) Toll records of the Ohio Bell Telephone Company for telephone number 216/221-3880, listed to ERNEST CHICKENO, Apartment 1621, 12900 Lake, Lakewood, Ohio, for the period June 3 through June 24, 1972, reflect the following information:

Five (5) calls were made from 216/221-3880 to 216/327-4193. Records of the Elyria, Ohio, Telephone Company show the latter number is listed to SUZANNE VERES, 4958 Gates Moss Oval, North Ridgeville, Ohio.

Six (6) telephone calls were made to Youngstown, Ohio, telephone number 216/792-3822. Previous investigation by Special Agents of the FBI indicated that telephone number 216/792-3822 was listed to TONY CHESINO, 10 Idlewood, Apartment 302. Investigation by Special Agents of the FBI reveals that TONY CHESINO is an alias used by one DOMINIC BUZZACO.

A total of seven (7) calls were made to Cincinnati, Ohio, telephone numbers 513/242-9918 and 513/242-6664. Investigation conducted by Special Agents of the FBI, Cincinnati, Ohio, who in turn related the results of their investigation to affiant, reveals that both telephones are utilized by VANIS RAY ROBBINS, 320-322 Locust Street, Cincinnati, Ohio.

A total of three (3) telephone calls were made to telephone number 216/832-8602 and 216/832-5922, both in Massillon, Ohio. Both call numbers are listed to Ohio State Sports News, 1379 Lincoln Way, Massillon, Ohio. Previous investigation by Special Agents of the FBI reveal that the Ohio State Sports News is owned and operated by ROBERT COMBS, who is a self-admitted sports handicapper.

On September 21, 1972, the records of Ohio Bell Telephone Company, Cleveland, Ohio, were reviewed by affiant, who noted that telephone number 216/221-3880 was shown as disconnected and no replacement telephone was issued. The toll records showed further that telephone number 216/228-1495 continued to be listed to ERNEST CHICKENO, Apartment 1621, 12900 Lake, Lakewood, Ohio.

c) Records of the Ohio Bell Telephone Company reflect telephone numbers 216/777-0850, 216/777-0851 are listed to RICHARD WELLMAN, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio. Investigation set out herein has shown that these telephones are utilized by AL KOTOCH. Toll records reflect the following calls for the period from August 24, 1972, to September 18, 1972. The records reflect further that telephone number 216/777-0850 and 216/777-0851 are considered as one telephone inasmuch as this is a group or rotary type system, that is, when one above-mentioned number is busy, the call will automatically go to the second above-mentioned number.

Thirteen (13) calls were made to Youngstown, Ohio, telephone number 216/759-9594 and four (4) calls to Youngstown, Ohio, telephone number 216/759-9311.

Records of the Ohio Bell Telephone Company, Youngstown, Ohio, reflect that these numbers are listed to CHARLES MOORE, 1198 Will-o-Wood Drive, Liberty Township, Ohio. MOORE has been previously convicted on April 19, 1971, for violation of Federal Gambling Laws, Title 18, Sections 1952, 2, and 371, and on April 19, 1971, received sentence of five years probation and $5,000 fine in United States District Court, Cleveland, Ohio.

A total of thirty-three (33) telephone calls, at least once each day, to Massilion, Ohio, telephone numbers 216/832-8602 and 832-5922. Public records in Canton, Ohio, reflect that these numbers are listed to the Ohio State Sports News, 1379 Lincoln Way, Massillon, Ohio. Previous investigation by Special Agents of the FBI reveals that the Ohio State Sports News is owned and operated by ROBERT COMBS, who is a well-known self-admitted sports handicapper.

A total of fourteen (14) calls to Cincinnati, Ohio, to telephone numbers 216/242-6664 and 242-9918. The subscriber to these numbers is VANIS RAY ROBBINS, 320-322 Locust Street, Cincinnati, Ohio. ROBBINS is currently under indictment in Cincinnati for violation of Federal gambling laws, Title 18, United States Code, Sections 1952 and 371.

A total of 51 calls to Youngstown, Ohio, telephone number 216/792-3822. Previous investigation by Special Agents of the FBI indicates that the above number is listed to TONY CHESINO, 10 Idlewood, Apartment 302. Further investigation reveals that TONY CHESINO is an alias used by DOMINIC BUZZACO, who is known by Special Agents of the FBI as a bookmaker.

Twenty-seven (27) calls to Elyria, Ohio, telephone number 327-4193. Records of the Elyria Telephone Company, Elyria, Ohio, show this number is listed to SUZANNE VERES, 4958 Gates Moss Oval, North Ridgeville, Ohio.

B. Concerning the telephones allegedly used by GEORGE FLOREA, records of the Ohio Bell Telephone Company, Canton, Ohio, reveal publicly listed telephone number 453-6114 is issued to ANNETTE FLOREA, 204 Broad Avenue, Northwest, Canton, Ohio, and is billed to GEORGE FLOREA at this address. Telephone number 452-1624 is listed to MARGARET DELERBA, 204 Broad Avenue, Northwest, Canton, Ohio.

a) Toll records for telephone number 453-6114 from the period of August 12 through August 25, 1972, reflect three telephone calls to Las Vegas, Nevada, telephone number 702/732-2602, and one telephone call to Las Vegas, Nevada, telephone number 702/734-2415.

b) Toll records from telephone number 452-1624 for the period from August 11 through September 4, 1972, reflect eight telephone calls to telephone number 702/732-2602, and five calls to Las Vegas, Nevada, telephone number 702/734-2415. Toll records for the above-mentioned period of August 11 through September 4, 1972, also show two telephone calls to Cleveland, Ohio, telephone number 216/228-3880, and one telephone call to Cleveland, Ohio, telephone number 216/228-1495, both telephones listed to ERNEST CHICKENO, Apartment 1621, 12900 Lake, Lakewood, Ohio.

c) Toll records for telephone number 452-1624 for August 11 through September 4, 1972, further reflect four telephone calls from the period of September 2 through September 4, 1972, to telephone number 216/777-0850, which number is listed to RICHARD WELLMAN,

Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, which previous investigation by Special Agents of the FBI has shown is utilized by AL KOTOCH.

A review of the toll records of the Central Telephone Company in Las Vegas, Nevada, by Special Agents of the FBI, who in turn, related to affiant the following information:

702/732-2602 and 702/734-2415 are telephone numbers currently assigned to RAYMOND VARA, 1674 Seneca Lane, Las Vegas, Nevada. These numbers are billed to Post Office Box 15308, Las Vegas, Nevada.

A review of the toll records of telephone number 734-2415 by Special Agents of the FBI from the period September 2, 1972, to September 30, 1972, reflect the following calls:

Three telephone calls to Canton, Ohio, telephone number 452-1624, which is utilized by GEORGE FLOREA, 204 Broad Avenue, Canton, Ohio.

C. Concerning the telephone subscribed to by SUZANNE VERES, the Elyria Telephone Company, Elyria, Ohio, advised that SUZANNE VERES, 4958 Gate Moss Oval, North Ridgeville, Ohio, maintains telephone number 216/327-4193 in her residence.

Toll records for the period August 26 through September 17, 1972, reflect two calls to 216/228-1495, which is the telephone listed to ERNEST CHICKENO, Apartment 1621, 12900 Lake, Lakewood, Ohio; eight telephone calls to 216/777-0850, which telephone is listed to RICHARD WELLMAN, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, which investigation by Special Agents of the FBI has shown is utilized by AL KOTOCH; seven telephone calls to 216/777-7900.

On September 21, 1972, affiant reviewed the toll records of the Ohio Bell Telephone Company, Cleveland, Ohio, and from these records it was determined that the 216/777-7900 and 216/777-2238 are both listed to Dealer's Outlet, Inc., Auto Sales (People's Acceptance Corporation), 27105 Lorain Road, North Olmsted, Ohio.

5. PROBABLE CAUSE BASED ON INVESTIGATION AND INFORMANT INFORMATION REGARDING TELEPHONE NUMBERS (216) 777-0850 AND (216) 777-0851, USED BY AL KOTOCH IN HIS BOOKMAKING OPERATION.

A. Investigation has shown that ALBERT KOTOCH, JOSEPH A. SPAGANLO, ERNEST L. CHICKENO, RAYMOND PAUL VARA, GEORGE M. FLOREA, SUZANNE VERES, are involved in a bookmaking operation in violation of Federal Illegal Gambling Statute, Title 18, Section 1955, United States Code.

a) Surveillances by Special Agents of the FBI on September 11, 12, 13, 20, 22, and 25, 1972, through October, 1972, were conducted on AL KOTOCH, and generally show that KOTOCH departs his residence, 12000 Edgewater, Lakewood, Ohio, around 9:30 to 10:30 AM, in an auto bearing Ohio dealer license 2864, the type of auto varying from week to week, and driving to 25151 Brookpark Road, North Olmsted, Ohio. Surveillances then place KOTOCH in Apartment 512, at 25151 Brookpark Road, North Olmsted, Ohio. Surveillances also reveal that KOTOCH is using the apartment for accepting or placing bets, inasmuch as a Special Agent of the FBI and affiant, overheard a male voice, identified as that of KOTOCH engaged in a bookmaking conversation.

During the course of surveillances at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, no activity was ever noted in the apartment, nor would any person respond to the doorbell after KOTOCH departed Apartment 512.

b) The records of Ohio Bell Telephone Company reflect that 777-0850 and 777-0851 are telephone numbers listed to RICHARD WELLMAN, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio. The records further reflect telephone number 777-3850 listed to the same person at the same address.

The Ohio Bell Telephone Company records further reflect that 777-0850 and 777-0851 are considered one telephone inasmuch as this is a group on a rotary-type sys-

tem, that is, when one above-mentioned number is busy, the call will automatically go to the other number.

Previous investigation conducted by Special Agents of the FBI reflect that the name RICHARD WELLMAN is non-existant at the above address. This name was used at one time by JOSEPH SPAGANLO to disguise the true subscriber to SPAGANLO's telephone numbers.

c) As set forth above, reliable sources have advised as recently as November 27, 1972, that AL KOTOCH is still involved in bookmaking and uses telephone number (216) 777-0850.

d) Toll records for the month of September, 1972, reflect numerous long distance calls to known gambling figures throughout the State of Ohio.

6. PROBABLE CAUSE BASED ON INVESTIGATION AND INFORMANT INFORMATION REGARDING TELEPHONE NUMBERS (216) 453-6114 AND (216) 452-1624 USED BY GEORGE FLOREA IN HIS BOOKMAKING OPERATION.

A. Investigation has shown that ALBERT KOTOCH, JOSEPH A. SPAGANLO, ERNEST L. CHICKENO, RAYMOND PAUL VARA, GEORGE M. FLOREA, and SUZANNE VERES, are involved in a bookmaking operation, in violation of Federal Illegal Gambling Statute, Title 18, Section 1955, United States Code.

a) Reliable sources have advised as recently as November 27, 1972, that GEORGE FLOREA is involved with the above-mentioned individuals in bookmaking and utilizes his home telephone numbers (216) 453-6114 and (216) 452-1624 in his activities.

b) Surveillances by Special Agents of the FBI through October 24, 1972, were conducted on GEORGE FLOREA and generally show that FLOREA does not depart his residence until early afternoon, with no fixed pattern in his travels when he did depart his residence.

c) Toll records for telephone numbers (216) 453-6114 and (216) 452-1624 reflect numerous calls to RAYMOND PAUL VARA in Las Vegas, Nevada, as well as to telephone number (216) 777-0850 listed to RICHARD

WELLMAN, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, in which previous investigation set forth herein has shown telephone number utilized by AL KOTOCH solely for bookmaking activities.

Toll records for FLOREA for telephone number 452-1624 were reviewed by Special Agents of the FBI on October 18, 1972, and show the following telephone calls for the period of September 7 through September 27, 1972:

Five (5) telephone calls to Westlake, Ohio, Telephone Number (216) 777-0850.

Previous investigation set forth herein shows that this telephone is subscribed to by RICHARD WELLMAN, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and this telephone is used by AL KOTOCH for bookmaking activities.

Two (2) telephone calls to Youngstown, Ohio, telephone number 759-9594. Records of the Ohio Bell Telephone Company reflect that this number is listed to CHARLES MOORE, 1198 Will-o-Wood Drive, Liberty Township, Ohio. CHARLES MOORE has been previously convicted in violation of Federal gambling laws in the same case which involved JOSEPH ANTHONY SPAGANLO and RAYMOND PAUL VARA, that is, MOORE pled guilty to the charge of violation of Title 18, Sections 1952, 2, and 371. MOORE pled guilty to the above charges in United States District Court, Cleveland, Ohio, on April 19, 1971. MOORE received five years probation and was fined $5,000.

Toll records for telephone number (216) 453-6114, which is listed to ANNETTE FLOREA, 204 Broad Avenue, Canton, Ohio, were reviewed by Special Agents of the FBI, and show the following telephone calls for the period August 31, 1972, through September 24, 1972:

Thirteen (13) telephone calls to Westlake, Ohio, Telephone Number 777-0850. Previous investigation set forth herein shows that this telephone is subscribed to by RICHARD WELLMAN, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and this telephone is used by AL KOTOCH for bookmaking activities.

Two (2) telephone calls to Las Vegas, telephone number 732-2602. This telephone number through previous investigation is determined to be subscribed to by RAYMOND VARA, 1674 Seneca Lane, Las Vegas, Nevada. This number is billed to Post Office Box 15308, Las Vegas, Nevada.

VI. NEED FOR INTERCEPTION

A. Based upon the investigation set forth above, there is probable cause to believe that telephone numbers (216) 777-0850 and (216) 777-0851, located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, telephone numbers (216) 453-6114, and (216) 452-1624 located at 204 Broad Street, Canton, Ohio, are being used by ALBERT KOTOCH, ERNEST CHICKENO, JOSEPH A. SPAGANLO, RAYMOND P. VARA, GEORGE M. FLOREA and SUZANNE VERES in furtherance of an illegal bookmaking operation in violation of Federal Illegal Gambling Statutes, Title 18, United States Code, Section 1955.

B. The informants named herein have said that they will not testify to the information that they have produced, inasmuch as they fear for the safety of themselves and their families.

C. My experience, and the experience of other Special Agents, has shown that even though gambling customers are identified, they are often unwilling to furnish information to law enforcement Agents or officials inquiring into gambling activities. Experience has further established that even though telephone toll records are available which indicate a person is engaged in illegal gambling, the records themselves are not sufficient to prove gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that others as yet unknown, are involved in an illegal gambling business. Furthermore, such investigative techniques as physical surveillance and examination of the records failed to gather the evidence necessary to sustain prosecution for violation of the offenses enumerated above, and reasonably appear unlikely

to succeed; that an order from this court should ensue to intercept wire communications from telephone numbers (216) 777-0850, (216) 777-0851, (216) 453-6114, and (216) 452-1624, that will not terminate upon the first interception that reveals the manner in which ALBERT KOTOCH, JOSEPH A. SPAGANLO, ERNEST L. CHICKENO, RAYMOND PAUL VARA, GEORGE M. FLOREA, SUZANNE VERES and others as yet unknown, participate in the illegal gambling business, but continue until interception reveals the identities of confederates of ALBERT KOTOCH, JOSEPH A. SPAGANLO, ERNEST L. CHICKENO, RAYMOND PAUL VARA, GEORGE M. FLOREA, and SUZANNE VERES, and others as yet unknown, their places of operation and the nature of the conspiracy involved herein or for a period of 15 days from the date of the order, whichever is earlier.

In the case of JOSEPH ANTHONY SPAGANLO, application was made by Special Agents of the FBI on October 2, 1969, and approved in United States District Court, Cleveland, Ohio, for a court ordered interception of wire communications on telephone numbers 241-6162, 241-6639, 696-4085, 861-4756, 781-1587 and 781-1996, all located at 3046 West 25th Street, Cleveland, Ohio, and used by JOSEPH A. SPAGANLO and others in violation of Title 18, United States Code, Sections 1952, 1084, and 371. This interception was terminated on October 17, 1969. As a result of evidence obtained from this interception an indictment was returned by U.S. Federal Grand Jury, Cleveland, Ohio, on JOSEPH A. SPAGANLO for seven counts of violation of Sections 1952, 2, and 371—Interstate Transportation in Aid of Racketeering—Gambling; Conspiracy to Violate. On April 19, 1971, JOSEPH A. SPAGANLO entered a plea of guilty in U.S. District Court, Northern District of Ohio to violation of Title 18, Section 371, Conspiracy to violate 1952 and was sentenced on April 19, 1971, to five years probation and $5,000 fine.

In the case of RAYMOND PAUL VARA, application was made by Special Agents of the FBI on November 6, 1969, for a court ordered interception on telephone num-

bers 792-8430 and 792-8321, listed to NELLO RONCI, 1218 South Meridian Road, Youngstown, Ohio. These telephones were used by RONCI and RAYMOND PAUL VARA for their bookmaking activities in connection with JOSEPH A. SPAGANLO. The interception was terminated on November 21, 1969, and as a result the evidence obtained from the above interception led to an indictment returned by U.S. Federal Grand Jury against RAYMOND PAUL VARA, and on April 19, 1971, VARA entered a plea of guilty in U.S. District Court, Cleveland, Ohio, to violation of Title 18, United States Code, Sections 371 Conspiracy to violate Section 1952 and was sentenced on April 19, 1971, to five years probation and $5,000 fine.

No other application or authorization other than that set forth above to intercept wire or oral communications for any of the above subjects, telephone numbers or premises is known to have been made.

Not Signed

RICHARD L. AULT, JR.
Special Agent
Federal Bureau of Investigation

Sworn to before me, and subscribed in my presence, November 28, 1972,

/s/ Frank J. Battisti
United States District Judge

ORDER

[Filed November 28, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR THE INTERCEPTION OF WIRE COMMUNICATIONS

ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

TO: Federal Bureau of Investigation
Department of Justice

Application under oath having been made before me by Steven R. Olah, an attorney with the Organized Crime and Racketeering Section, Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an Order authorizing the interception of wire communications pursuant to Section 2518, United States Code, based on the facts disclosed by said application and on the affidavit and supporting documents attached thereto, I make the following findings:

(a) There is probable cause to believe that Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others as yet unknown are committing, have committed and are about to commit and are conspiring to commit an offense enumerated in Section 2516 of Title 18, United States Code, to wit: conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business which has been or remains in substantially

continuous operation for a period in excess of thirty days in violation of Title 18, United States Code, Section 1955, and Section 371 of Title 18, United States Code.

(b) There is probable cause to believe that communications concerning these offenses will be obtained through the interception, authorization for which is herein applied. In particular, communications will be intercepted concerning the placing and receiving of sports bets and action and the dissemination of "line" information.

(c) Normal investigative procedures reasonably appear to be unlikely to succeed if tried.

(d) There is probab'e cause to believe that the telephones numbered (216) 777-0850 and (216) 777-0851, both located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and both subscribed to by Richard Wellman and the telephones numbered (216) 453-6114 subscribed to by Annette Florea and billed to George Florea and (216) 452-1624 subscribed to by Margret Delerba, both located at 204 Broad Avenue, Northwest, Canton, Ohio, have been used and are being used in connection with the commission of the above-described offenses by Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others, as yet unknown.

WHEREFORE, it is hereby Ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to Application authorized by the Assistant Attorney General of the Criminal Division, the Honorable Henry E. Petersen, who has been specially designated by the Attorney General of the United States, the Honorable Richard G. Kleindienst, to exercise the power conferred on him by Section 2516 of Title 18, United States Code:

(1) To intercept wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others, as yet unknown concerning the above-described offenses to and from the telephones numbered (216) 777-0850 and (216) 777-0851, both located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and both subscribed to by Richard Wellman and the telephones numbered (216) 453-6114 subscribed to by Annette Florea and billed to George Florea and (216) 452-1624 subscribed to by Margret Delerba, both located at 204 Broad Avenue, Northwest, Canton, Ohio.

(2) Such interceptions shall not automatically terminate when the types of communications described above in paragraph (b) have first been obtained, but shall continue until communications are intercepted which reveal the exact manner in which Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres and others, as yet unknown participate in the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business and which reveal the identities of their confederates and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDED THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order, shall be conducted in such a way as to minimize the interception of communications that are otherwise not subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDED ALSO, that Steven R. Olah shall provide the Court with a report on the sixth (6th) and tenth (10th) days following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continual interception.

It is further ordered that the Ohio Bell Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Ohio Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

/s/ Frank J. Battisti
United States District Judge

DATE November 28, 1972 at 9:52 a.m.

[Filed December 4, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR THE INTERCEPTION OF WIRE COMMUNICATIONS

PROGRESS REPORT

Steven R. Olah, an attorney with the Organized Crime and Racketeering Section, of the United States Department of Justice respectfully submits this report showing what progress has been made toward the achievement of the authorized objective and need for continued interception:

1. On November 28, 1972, at approximately 10:00 a.m. upon application of Steven R. Olah, filed on November 28, 1972, an Order was signed by this Court authorizing interception of wire communications to and from telephones numbered (216) 777-0850, (216) 777-0851, (216) 452-1624 and (216) 453-6114. This report, filed on the sixth day following the date of the Order authorizing interception of wire communications and covering the first five days of interception is made in compliance with the terms of that Order and pursuant to the terms of 18 U.S.C. § 2518(6).

2. The progress toward achievement of the authorized objective is as follows:

a. November 28, 1972

(1) Telephone numbered (216) 777-0850—of 50 incoming calls all were monitored, and wagers totaling approximately $16,600 were accepted by an individual referred to as "Al" and Albert. Sports line information was disseminated by Albert during the course of almost every incoming call.

(2) Telephone numbered (216) 777-0851—of 38 incoming calls all were monitored and $6,060 in bets were received by Al.

(3) Telephone numbered (216) 452-1624—no calls were monitored.

(4) Telephone numbered (216) 453-6114—of ten outgoing calls one was monitored and the caller discussed owing $660 with the individual answering. In addition line information was discussed during this conversation.

b. November 29, 1972

(1) Telephone numbered (216) 777-0850—of 41 incoming calls all were monitored and $18,050 was wagered on basketball and football games.

(2) Telephone numbered (216) 777-0851—of 17 incoming calls 17 were monitored and approximately $1,200 in bets were taken.

(3) Telephone numbered (216) 452-1624—of ten incoming calls, ten were monitored; of eight outgoing calls, eight were monitored. A total of $1,600 was wagered and discussions of lay offs were overheard during these conversations.

(4) Telephone numbered (216) 453-6114—of 14 outgoing calls, 14 were monitored and approximately $2,500 in wagers were placed.

c. November 30, 1972

(1) Telephone numbered (216) 777-0850—33 incoming calls, all were monitored; in excess of $4,200 was wagered.

(2) Telephone numbered (216) 777-0851—14 incoming calls were monitored and all concerned gambling. In excess of $3,000 was wagered during the course of monitoring on this date. The individual answering the phone was referred to as Al, Albert or George.

(3) Telephone numbered (216) 452-1624—of nine incoming calls five were monitored; of 30 outgoing calls seven were monitored. During the course of interception in excess of $1,000 was wagered with the individual at (216) 452-1624.

(4) Telephone numbered (216) 453-6114—total of 27 outgoing calls and four incoming calls were made. No conversations were monitored inasmuch as they were all with regards to personal matters.

d. December 1, 1972

(1) Telephone numbered (216) 777-0850—of 63 incoming calls, 51 were monitored and of one outgoing call none were monitored. A total of $14,150 was wagered and in addition to wagers placed, most calls included discussions of line information and lay off activity.

(2) Telephone numbered (216) 777-0851—of 31 incoming calls, 31 were monitored and of one outgoing call one was monitored. Approximately $1,600 was wagered and in one call Al layed off $300 to "Jimmy".

(3) Telephone numbered (216) 452-1624—of 11 incoming calls 11 were monitored and of 35 outgoing calls 10 were monitored. A total of approximately $3,350 was wagered.

(4) Telephone numbered (216) 453-6114—of five incoming calls one was monitored and of eight outgoing calls one was monitored. Both of these monitored conversations concerned general discussion of wagering business, but no specific wagers were placed.

e. December 2, 1972

(1) Telephone numbered (216) 777-0850—of 151 incoming calls, 149 were monitored and of two outgoing calls both were monitored. In excess of $19,500 was wagered.

(2) Telephone numbered (216) 777-0851—of 68 incoming calls all were monitored and of two outgoing calls both were monitored. Bets totaling approximately $21,400 were placed.

(3) Telephone numbered (216) 452-1624—of 15 incoming calls ten were monitored; 54 outgoing calls, 21 were monitored. Wagers approximating $3,430 were placed and accepted.

(4) Telephone numbered (216) 453-6114—of seven incoming calls two were monitored and of 20 outgoing calls eight were monitored. Again, general discussions of gambling was overheard during these calls, but no specific wagers were placed or accepted.

3. Due to the fact that the gambling operation in question is an established business of a continuing nature, it is believed that additional communications of the same type as those described in paragraph 2 above, will continue to occur.

4. Continued interception is necessary for the following reasons:

(a) It appears that Al, of telephones numbered (216) 777-0850 and (216) 777-0851 uses a code system when placing his lay off wagers (for example, "deuce"). It appears that the bookmakers with whom he is laying off are familiar with that code, but it has not yet been ascertained by the monitoring agents. Until such facts are determined, it is not possible to approximate total gross handle with regards to lay offs.

(b) The identity of "Jim" and other bookmakers with whom Al is laying off has not positively been established.

(c) Five persons have not yet been placed in the gambling operation. This figure is necessary to constitute a Federal violation.

(d) There has yet to be lay off activity between Al Kotoch (at 777-0850 and 777-0851) and George Florea (at 452-1624 and 453-6114), two of the subjects of this interception.

(e) The great preponderance of telephone calls monitored at 777-0850 and 777-0851 are incoming calls. Outgoing telephone calls occur at a minimum and more outgoing calls need to be monitored in order to establish the identities of Kotoch's lay off bookmakers.

Respectfully submitted,

/s/ Steven R. Olah
STEVEN R. OLAH
Special Attorney
Criminal Division
U. S. Department of Justice

DATE December 4, 1972

[Filed December 8, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR THE INTERCEPTION OF WIRE COMMUNICATIONS

PROGRESS REPORT #2

Steven R. Olah, an attorney with the Organized Crime and Racketeering Section, of the United States Department of Justice, respectfully submits this report showing what progress has been made toward the achievement of the authorized objective and need for continued interception:

1. On November 28, 1972, at approximately 10:00 a.m. upon application of Steven R. Olah, filed on November 28, 1972, an Order was signed by this Court authorizing interception of wire communications to and from telephones numbered (216) 777-0850, (216) 777-0851, (216) 452-1624 and (216) 453-6114. This report, filed on the tenth day following the date of the Order authorizing interception of wire communications and covering the first ten days of interception is made in compliance with the terms of that Order and pursuant to the terms of 18 U.S.C. § 2518(6).

2. The progress toward achievement of the authorized objective is as follows:

a. December 3, 1972

(1) Telephone numbered (216) 777-0850—of 112 incoming calls 106 were monitored, and one outgoing call was monitored; wagers totaling approximately $26,800 were accepted.

(2) Telephone numbered (216) 777-0851—of 53 incoming calls all were monitored and $28,750 in bets were placed.

(3) Telephone numbered (216) 452-1624—of 5 incoming calls, 3 were monitored; of 22 outgoing calls, 6 were monitored; a total of $1,200 in bets were noted.

(4) Telephone numbered (216) 453-6114—of 16 outgoing calls, one was monitored, since it concerned gambling business. No bets were noted during the monitoring period.

(b) December 4, 1972

(1) Telephone numbered (216) 777-0850—of 49 incoming all were monitored and $10,850 was wagered on sporting events.

(2) Telephone numbered (216) 777-0851—of 42 incoming calls, 40 were monitored; one outgoing call was monitored. Approximately $10,300 in bets were taken. One call was monitored to telephone number 1-327-4193, the residence of SUZANNE VERES. During that call, the caller had a discussion concerning gambling with an individual believed to be JOE SPAGANLO.

(3) Telephone numbered (216) 452-1624—of 17 incoming calls, 12 were monitored; of 33 outgoing calls, 20 were monitored. A total of $5,100 was wagered on seven bets.

(4) Telephone numbered (216) 453-6114—of 5 incoming calls, 4 were monitored; and of 34 outgoing calls, seven were monitored; and approximately $460 in wagers were placed.

(c) December 5, 1972

(1) Telephone numbered (216) 777-0850—50 incoming calls, 42 were monitored; $43,100 was wagered. During one conversation, one $4,000 lay-off was wagered by the person at this location.

(2) Telephone numbered (216) 777-0851—20 incoming calls were monitored and 19 concerned gambling; $6,800 was wagered during the course of monitoring on this date.

(3) Telephone numbered (216) 452-1624—of 12 incoming calls five were monitored; of 31 outgoing

calls, 10 were monitored. During the course of interception, approximately $7,400 was wagered.

(4) Telephone numbered (216) 453-6114—of 11 incoming, one was monitored. No bets were noted. No outgoing calls were monitored.

(d) December 6, 1972

(1) Telephone numbered (216) 777-0850—of 36 incoming calls, 36 were monitored. No outgoing calls were monitored. A total of $17,400 was wagered with AL KOTOCH.

(2) Telephone numbered (216) 777-0851—of 18 incoming calls, all were monitored and no outgoing calls were monitored. Approximately $5,300 was wagered.

(3) Telephone numbered (216) 452-1624—of 11 incoming calls, 7 were monitored and of 18 outgoing calls, 15 were monitored. One wager was noted, but the amount was not determined.

(4) Telephone numbered (216) 453-6114—of five incoming calls one was monitored and of six outgoing calls three were monitored. All of these monitored conversations concerned general discussion of wagering business, including discussion of line and lay-off, but no specific wagers were placed.

(e) December 7, 1972

(1) Telephone numbered (216) 777-0850—of 32 incoming calls, 32 were monitored and of two outgoing calls both were monitored. In excess of $1,300 was wagered. In addition, AL KOTOCH placed a call to bookmaker VANIS RAY ROBBINS in Cincinnati during which line information was discussed.

(2) Telephone numbered (216) 777-0851—of 14 incoming calls all were monitored and no outgoing calls were monitored. Bets totaling approximately $2,130 were placed.

(3) Telephone numbered (216) 452-1624—of 10 incoming calls 7 were monitored; of 13 outgoing calls, 11 were monitored. Wagers approximating $4,000 were made. During one outgoing call to 702-732-

2602, GEORGE FLOREA spoke to RAYMOND VARA in Las Vegas, Nevada and had a discussion concerning line information.

(4) Telephone numbered (216) 453-6114—of four incoming calls, none were monitored and of 2 outgoing calls, none were monitored. At 11:00 p.m. this date, monitoring of this telephone was terminated.

3. Due to the fact that the gambling operation in question is an established business of a continuing nature, it is believed that additional communications of the same type as those described in paragraph 2 above will continue to occur.

4. Continued interception is necessary for the following reasons:

(a) The identities of other bookmakers with whom AL KOTOCH deals have not yet been established.

(b) Five persons have not yet been placed in the gambling operation. This figure is necessary to constitute a Federal violation.

(c) There has yet to be lay off activity between AL KOTOCH (at 777-0850 and 777-0851) and GEORGE FLOREA (at 452-1624 and 453-6114), two of the subjects of this interception.

(d) The overwhelming majority of telephone calls monitored at 777-0850 and 777-0851 are incoming calls. Outgoing telephone calls occur at a minimum and more outgoing calls need to be monitored in order to establish the identities of KOTOCH's lay off bookmakers.

Respectfully submitted,

/s/ Steven R. Olah
STEVEN R. OLAH

DATE 12/8/72

[Filed December 26, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE CONTINUED INTERCEPTION OF WIRE COMMUNICATIONS

APPLICATION FOR EXTENSION

Steven R. Olah, an Attorney with the Organized Crime and Racketeering Section of the United States Department of Justice, being duly sworn states:

This sworn application is submitted in support of a request for an extension of the order authorizing the interception of wire communications. This application for an extension of the original order has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, United States Department of Justice, Washington, D. C., together with Agents of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer —of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is— he is an Attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable Richard G. Kleindienst, has authorized this Application for an extension of the order authorizing the interception of wire communications. Attached to this Application as Exhibit A are the letter of notification of approval from the Assistant Attorney General of the Criminal Division, the Honorable Henry E. Petersen, and the memorandum of au-

thorization approved by the Attorney General of the United States, the Honorable Richard G. Kleindienst.

3(a) On November 28, 1972, an order was signed by Chief Judge Frank J. Battisti, U. S. District Court, Northern District of Ohio, Eastern Division, authorizing interception of wire communications on telephones numbered (216) 777-0850 and (216) 777-0851, located at 25151 Brookpark Road, Apartment 512, North Olmsted, Ohio, and telephones numbered (216) 452-1624 and (216) 453-6114, located at 204 Broad Avenue, N.W., Canton, Ohio. This order authorized interception of conversations involving Albert Kotoch, Joseph Anthony Spaganlo, Ernest L. Chickeno, Raymond Paul Vara, George M. Florea, Suzanne Veres, and others unknown at that time. Pursuant to this order, agents of the Federal Bureau of Investigation began intercepting conversations on November 28, 1972. Interception was terminated on telephone number (216) 453-6114 on December 7, 1972; and interception was terminated on telephones numbered (216) 777-0850, (216) 777-0851, and (216) 452-1624 on December 12, 1972.

3(b) This application, based upon the interception made pursuant to the order of November 28, 1972, signed by Chief Judge Frank J. Battisti, seeks authorization to continue interceptions over the telephones numbered (216) 777-0850 and (216) 777-0851. This application seeks authorization to intercept wire communication of Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is—offenses involving the conducting, financing, managing, supervision, directing, or owning all or part of an illegal gambling business that violates the laws of the State of Ohio and violates Section 1955 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code, which have been committed and are being committed by Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown.

4. Section 803 of Title VIII, entitled Syndicated Gambling of the "Organized Crime Control Act of 1970", Public Law 91-452, 91st Congress, approved October 15, 1970, Amended Chapter 95, Title 18, United States Code, by adding a new section, Section 1955, Prohibition of Illegal Gambling Businesses. Section 801 of Title VIII of this Act contains special findings that illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof.

5. The prohibited illegal gambling business described herein violates the laws of the State of Ohio, specifically one or more of the following sections: 2915.06, 2915.09, 2915.121, 2915.122, and 2915.14 of the Ohio Revised Code.

6. He has discussed all the circumstances of the above offenses with Special Agent Richard L. Ault, Jr., of the Cleveland, Ohio Office of the Federal Bureau of Investigation who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Ault (attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown have committed and are committing offenses involving the conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business in violation of Section 1955 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown concerning these offenses will be obtained through the continued interception, authorization for which is applied for herein. In particular, these wire communications will concern the placing and receiving

of sports bets and action and the dissemination of "line" information.

(c) normal investigative procedures reasonably appear to be unlikely to succeed if tried.

(d) there is probable cause to believe that the telephones numbered (216) 777-0850 and (216) 777-0851, both located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and both subscribed to by Richard Wellman, have been used and are being used by Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown in connection with the commission of the above described offenses.

7. Two previous applications have been made to Judges for authorization to intercept wire communications involving persons, facilities, or places specified or mentioned in the application or its incorporated affidavits:

(a) Reference is made to "In The Matter of the Application of the United States for an Order Authorizing the Interception of Wire Communications", wherein the Honorable Frank J. Battisti, Chief Judge, Northern District of Ohio, on November 28, 1972, authorized the interception of certain wire communications involving three of the subjects and two of the facilities which are the subjects of the instant application;

(b) Joseph Anthony Spaganlo was a subject of interception of wire communications pursuant to an order signed by the Honorable Judge Frank J. Battisti on October 2, 1969, at 10:30 a.m., authorizing the interception of wire communications to and from the telephone numbers (216) 241-6162, (216) 241-6639, (216) 696-4085, (216) 861-4756, (216) 781-1587, and (216) 781-1996, all located on the second floor at 3064 West 25th Street, Cleveland, Ohio.

WHEREFORE, your applicant believes that probable cause exists to believe that Albert Kotoch, Joseph Anthonly Spaganlo, Chuck (LNU), (FNU) Slyman, George

M. Florea, and others as yet unknown are conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business involving five or more persons which has been or remains in substantially continuous operation for a period in excess of thirty days and violates the laws of the State of Ohio, and which therefore, is in violation of Section 1955 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code; that Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown have used, and are using, the telephones numbered (216) 777-0850 and (216) 777-0851 both located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and both subscribed to by Richard Wellman in connection with the commission of the above-described offenses; that communications of Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown concerning these offenses will be intercepted to and from the above-described telephones; and that normal invstigative procedures reasonably appear to be unlikely to succeed if tried.

On the basis of the allegations contained in this application, the affidavit of Special Agent Richard L. Ault, Jr., which is attached and made a part of this application, and the affidavit for the original order dated November 28, 1972, which is made a part of this affidavit, affiant requests that this court issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation of the United States Department of Justice to continue to intercept wire communications to and from the above-described telephones, which interceptions shall not automatically terminate when the described types of communications have first been obtained, but shall continue until communications are intercepted which reveal the manner in which Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown participate in the conducting, financing, managing, supervising, directing or

owning all or part of an illegal gambling business in violation of Title 18, United States Code, Section 1955 and the laws of the State of Ohio and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of that order, whichever is earlier.

It is further requested that this court issue an order pursuant to the power conferred on it by Section 2518 (4)(e) of Title 18, United States Code, directing that the Ohio Bell Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the continued interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Ohio Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

/s/ Steven R. Olah

Subscribed and sworn to before me this 26th day of December, 1972.

/s/ Leroy J. Contie, Jr.
United States District Judge

[Filed December 26, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

APPLICATION

Steven R. Olah, an Attorney with the Organized Crime and Racketeering Section of the United States Department of Justice, being duly sworn states:

This sworn application is submitted in support of an order authorizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, United States Department of Justice, Washington, D. C., together with Agents of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer—of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is—he is an Attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable Richard G. Kleindienst has authorized this Application for an order authorizing the interception of wire communications. Attached to this Application as Exhibit A are the letter of notification of approval from the Assistant Attorney General of the Criminal Division, the Honorable Henry E. Petersen and the memorandum of authorization approved

by the Attorney General of the United States, the Honorable Richard G. Kleindienst.

3. This application seeks authorization to intercept wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is—offenses involving the conducting, financing, managing, supervision, directing, or owning all or part of an illegal gambling business that violates the laws of the State of Ohio and violates Section 1955 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code, which have been committed and are being committed by Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown.

4. Section 803 of Title VIII, entitled Syndicated Gambling of the "Organized Crime Control Act of 1970", Public Law 91-452, 91st Congress, approved October 15, 1970, Amended Chapter 95, Title 18, United States Code, by adding a new section, Section 1955, Prohibition of Illegal Gambling Businesses. Section 801 of Title VIII of this Act contains special findings that illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof.

5. The prohibited illegal gambling business described herein violates the laws of the State of Ohio, specifically one or more of the following sections: 2915.06, 2915.09, 2915.121, 2915.122 and 2915.14 of the Ohio Revised Code.

6. He has discussed all the circumstances of the above offenses with Special Agent Richard L. Ault, Jr., of the Cleveland, Ohio Office of the Federal Bureau of Investigation who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Ault (attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown have committed and are committing offenses involving the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business in violation of Section 1955 of Title 18, United States Code and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown concerning these offenses will be obtained through the interception, authorization for which is applied for herein. In particular, these wire communications will concern the placing and receiving of sports bets and action and the dissemination of "line" information.

(c) normal investigative procedures reasonably appear to be unlikely to succeed if tried.

(d) there is probable cause to believe that the telephone numbered (216) 777-3850 located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, subscribed to by Richard Wellman, has been used and is being used by Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown in connection with the commission of the above-described offenses.

7. No previous application is known to have been made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities, or places specified therein, except as contained in the application for continued interception of telephones numbered (216) 777-0850 and (216) 777-0851 filed with and granted by this Court this date.

WHEREFORE, your applicant believes that probable cause exists to believe that Albert Kotoch, Joseph An-

thony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown are conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business involving five or more persons which has been or remains in substantially continuous operation for a period in excess of thirty days and violates the laws of the State of Ohio, and which therefore, is in violation of Section 1955 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code; that Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown have used, and are using the telephone numbered (216) 777-3850, located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and subscribed to by Richard Wellman, in connection with the commission of the above-described offenses; that communications of Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown concerning these offenses will be intercepted to and from the above-described telephone; and that normal investigative procedures reasonably appear to be unlikely to succeed if tried.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Richard L. Ault, Jr., which is attached and made a part of this application, affiant requests that this Court issue an Order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation of the United States Department of Justice to intercept wire communications to and from the above-described telephone, which interceptions shall not automatically terminate when the described types of communications have first been obtained, but shall continue until communications are intercepted which reveal the manner in which Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown participate in the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business in violation of Title 18, United States Code, Section 1955

and the laws of the State of Ohio and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of that Order, whichever is earlier.

It is further requested that this court issue an order pursuant to the power conferred on it by Section 2518 (4) (e) of Title 18, United States Code, directing that the Ohio Bell Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Ohio Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

/s/ Steven R. Olah

Subscribed and sworn to before me this 26th day of December, 1972.

/s/ Leroy J. Contie, Jr.
United States District Judge

[Filed December 26, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE CONTINUED INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS, AND AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS

AFFIDAVIT

I, RICHARD L. AULT, JR., being duly sworn, state:

I am an "investigative or law enforcement officer . . . of the United States" within the meaning of Section 2510 (7) of Title 18 United States Code; that is, an officer of the United States who is empowered by law to conduct investigations of an make arrests for offenses enumerated in Section 2516, Title 18, United States Code.

For two years I have been engaged in the investigation of organized criminal activities. For one year, I have been primarily engaged in the investigation of organized criminal activities and gambling matters in the Northern Ohio area. On November 28, 1972, I swore to an affidavit before Chief United States District Judge FRANK J. BATTISTI, United States District Court, Northern District of Ohio, Eastern Division, Cleveland, Ohio. All affirmations set forth in that affidavit are incorporated by reference herein. A copy of said affidavit is attached hereto.

On November 28, 1972, I received a Court Order from the United States District Court, Northern District of Ohio, Eastern Division, to intercept wire communications on telephone numbers (216) 777-0850 and (216) 777-0851, located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and telephone numbers (216) 452-1624 and 453-6114 located at 204 Broad Avenue, N.W.,

Canton, Ohio. On November 28, 1972, The Federal Bureau of Investigation began intercepting conversations of ALBERT KOTOCH and GEORGE FLOREA pursuant to this Court Order. KOTOCH's telephone conversations were intercepted from November 28, 1972, to December 12, 1972, at which time these phones were disconnected pursuant to the court order issued by Chief Judge FRANK J. BATTISTI, United States District Court, Northern District of Ohio, Eastern Division. Telephone number (216) 453-6114, utilized by GEORGE FLOREA was monitored from November 28, 1972, until 11:00 p.m. December 7, 1972, at which time it was disconnected inasmuch as very few calls concerning gambling business were made on that telephone. Telephone number (216) 452-1624 utilized by GEORGE FLOREA was monitored from November 28, 1972, until December 12, 1972, at which time this phone was disconnected pursuant to the court order issued by Chief Judge FRANK J. BATTISTI, United States District Court, Northern District of Ohio, Eastern Division.

I. PROBABLE CAUSE FROM INTERCEPTION OF WIRE COMMUNICATIONS EXISTS TO SHOW THAT AL KOTOCH IS CONDUCTING A BOOKMAKING OPERATION IN VIOLATION OF FEDERAL GAMBLING LAWS

A. During the time from November 28, 1972, to December 12, 1972 KOTOCH's telephonic conversations were intercepted and revealed that he is conducting a major sports bookmaking operation each day from approximately 5:00 p.m. to 7:30 p.m. during the week and from 11:00 a.m. to 4:00 p.m. during the weekend. During the period from November 28, 1972, to December 11, 1972, a total of 779 incoming calls and 13 outgoing calls were noted at telephone number (216) 777-0850 with 777 of the incoming and 12 of the outgoing calls monitored inasmuch as they concerned gambling business. During this period, in excess of $261,100 in bets was made over this telephone.

During the period from November 28, 1972, to December 11, 1972, a total of 440 incoming and nine outgoing calls were noted at telephone (216) 777-0851. Of these, 337 incoming and nine outgoing calls were monitored inasmuch as they were gambling business. A total in excess of $123,100 in bets were placed over this phone. Of a total of 1,135 telephone calls monitored at (216) 777-0850 and 777-0851, only 21 of these were outgoing calls. Therefore, it has been extremely difficult to establish the identities of the callers. The interception has further revealed:

a. On December 2, 1972, December 6, 1972, and December 8, 1972, ALBERT KOTOCH was called by GEORGE FLOREA at KOTOCH's telephones, (216) 777-0850 and (216) 777-0851. KOTOCH and FLOREA exchanged line information and FLOREA would advise KOTOCH as to which sports teams were going to "move" that is, teams upon which FLOREA had information that the "line" was going to change, so that KOTOCH might be able to bet the team to his advantage.

b. On December 2, 1972, during the course of numerous calls to the two telephones set forth herein above, an individual identified by voice as AL KOTOCH advised callers that as of Monday, December 4, 1972, an indivdual whose code name was "CHUCK" would be with KOTOCH taking calls. During this week of December 4 through December 9, 1972, an individual would answer the two telephones mentioned above, identify himself as "CHUCK" and accept bets and line information. Further, during the course of telephone calls on the two above mentioned telephones on December 4, 1972, and December 5, 1972, an individual identified by voice as AL KOTOCH was overheard to tell several individuals that he would be in contact with them from another telephone, not at the same location as the above two numbers, and that "CHUCK" would be at the two above mentioned numbers.

c. On December 2, 1972, during the course of an incoming telephone call, on (216) 777-0850, an individual identified by voice as AL KOTOCH was overheard to advise the caller that an individual known as "RAY" at telephone numbers 1-513-242-6664, and 1-513-242-9918,

was KOTOCH's big "out." That is, an individual to whom KOTOCH could lay-off big bets. These telephone numbers are listed to VANIS RAY ROBBINS, as shown on Page 36 of the attached affidavit. On December 7, 1972, an individual identified by voice as AL KOTOCH placed a phone call to telephone number 1-513-242-6664 from (216) 777-0850, and talked to an individual named RAY about "line" information and "bottom" figures.

d. On December 4 and December 7, 1972, AL KOTOCH placed telephone calls to telephone number 1-827-4198, and spoke to a male identified by voice as JOSEPH SPAGANLO. During the course of the conversations, KOTOCH received instructions on how to bet a certain team. On December 7, 1972, SPAGANLO told KOTOCH, "we can't carry him if he won't pay." 1-327-4193 is listed to SUZANNE VERES as shown on pages 40 and 41 of attached affidavit.

e. During the course of monitoring conversations on (216) 777-0850 and (216) 777-0851, no less than five individuals called KOTOCH on a daily basis to give him "line" information and ask him what teams to bet for him. That is, these individuals, who are not all identified, are acting as agents for KOTOCH. Among these individuals are:

1. On a daily basis, since monitoring began on November 28, 1972, an individual known as "22" and identified by Special Agents of the Federal Bureau of Investigation as (First Name Unknown) SLYMAN calls "line" information in to KOTOCH, and at times takes bets from KOTOCH to place with other bookmakers. On December 7, 1972, SLYMAN advised KOTOCH that he, SLYMAN, had a partner who works in SLYMAN's bookmaking office while SLYMAN sleeps late.

2. On a daily basis since monitoring commenced on November 28, 1972, an individual known as "SANDY" and identified by Special Agents of the Federal Bureau of Investigation as SANFORD GLASSMAN, calls AL KOTOCH to give line information and receive information as to what teams to bet. On November 29, 1972, "SANDY" advised KOTOCH that he would be receiving

bets from other individuals which he would then call into KOTOCH. SANFORD GLASSMAN was indicted by a United States Federal Grand Jury on May 19, 1971, Central District of California, on charges of violation of Title 18, United States Code, Sections 1952, 1084, and 371; and on December 11, 1972, entered a plea of guilty under Rule 20, to violation of Title 18, United States Code, Section 1952, in United States District Court, Northern District of Ohio, Eastern Division, Cleveland, Ohio. GLASSMAN was fined $2,500.

f. On December 10, 1972, AL KOTOCH was heard to state to a caller that the caller had only two or three "B.M's" (Bookmakers) to worry about and that he, KOTOCH, had 50-60 "guys."

II. PROBABLE CAUSE EXISTS THROUGH INTERCEPTION OF WIRE COMMMUNICATIONS TO BELIEVE THAT AL KOTOCH USES TELEPHONE NUMBER (216) 777-3850 TO CONDUCT AN ILLEGAL BOOKMAKING OPERATION.

A. The records of the Ohio Bell Telephone Company as of December 3, 1972, reveal that telephone number (216) 777-0850, (216) 777-0851, are listed to RICHARD WELLMAN, Apartment Number 512, 25151 Brookpark Road, North Olmsted, Ohio. The records also show that telephone number (216) 777-3850 is listed to RICHARD WELLMAN at the above address. The records further show no other phones at this address.

B. On November 28, 1972, an electronic surveillance was established on telephone number 777-0850 and 777-0851, pursuant to a court order signed by Chief Judge FRANK J. BATTISTI on November 28, 1972.

During the course of the above mentioned electronic surveillance, AL KOTOCH was observed entering the apartment house at 25151 Brookpark Road, at approximately 5:00 p.m. each day during the week. Within minutes of the time KOTOCH entered, telephone calls to 777-0850, and 777-0851 were answered. Prior to KOTOCH's entry to the apartment, telephones 777-0850 and 777-0851 were not used. Further, an individual, described as

a white male, approximately 5'9" tall, 170 pounds, with a beard, and a crossed eye, was seen entering the apartment 512, with AL KOTOCH on several occasions. During the course of surveillances by Special Agents of the FBI, AL KOTOCH and the other white male described above were observed leaving Apartment 512, during the week at approximately 7:35 p.m. Subsequent to this departure, no acivity was noted on either phone until approximately 5:30 p.m. the following day.

C. During the course of the above electronic surveillance, the following was noted:

a. On December 2, 1972, at 3:45 p.m., during the course of an incoming telephone call to telephone number (216) 777-0850, an individual identified by voice as AL KOTOCH placed an outgoing call on a third telephone, which monitoring equipment showed was not (216) 777-0851 and spoke to an idividual identified by KOTOCH as "RAY" about a bookmaker who needed to bet with "RAY."

b. On two occasions on December 3, 1972, and December 9, 1972, during the course of incoming calls, an individual identified by voice as AL KOTOCH was overheard to tell the caller that he would return the caller's call. On December 3, 1972, only one outgoing call was noted on telephone number 777-0850. This telephone call was four hours after KOTOCH had advised the caller he would call him back in five minutes. On December 9, 1972, during the course of an incoming call, an individual asked the male who answered the phone if he could talk to "him." The individual answering the phone said "He is busy. I'll have him call you." On December 9, 1972, no outgoing calls were placed from either telephone subsequent to the above mentioned call. On December 9, 1972, at 1:55 p.m. an individual identified by voice as AL KOTOCH received an incoming call from a male caller who said to KOTOCH that he had "it", referring to "line" information. KOTOCH stated "I'll call you right back on the other phone." No outgoing calls were noted on either phone until over an hour and a half after the above mentioned call.

On Saturday, December 3, 1972, during the course of an incoming call, telephone call being monitored on 777-0850, the individual talking on 777-0850 (male answering) asked the male calling to hold on while the male answering made a telephone call. Monitoring equipment did not reflect any outgoing calls on (216) 777-0851.

On December 3, 1972, at 11:11 a.m. the individual whose voice was recognized as that of AL KOTOCH, answered telephone 777-0850. KOTOCH told the male caller to hold on. KOTOCH's voice was then heard in the background discussing "line" information; there was no answering voice to his questions, and no phone call reflected on 777-0851 while this call was being monitored on 777-0850.

c. On December 3, 1972, while KOTOCH is talking on 777-0850, a telephone rang in KOTOCH's apartment, which monitoring equipment showed was not 777-0851.

Further on December 5, 1972, an individual identified by the caller as "AL" was talking on 777-0850 and a telephone rang in the background the monitoring equipment of 777-0851 reflected no incoming call. "AL" asked the male caller to wait, and could then be heard discussing "line" information in a one-way conversation in the background.

d. On December 5, 1972, at 5:54 p.m., during a conversation being monitored on 777-0851, between AL KOTOCH and an unknown male caller, a telephone was heard ringing in the background. The phone ringing was not 777-0850, inasmuch as no incoming calls were registered at this time. An individual was heard by affiant in the background to answer the phone "This is CHUCK. Ya, want New York?"

On December 11, 1972, while monitoring an incoming call on 777-0850, the individual whose voice was identified as that of AL KOTOCH's advised a male caller that he, KOTOCH, would call the caller back at telephone 398-4423. Monitoring equipment for both telephones, 777-0850, and 777-0851 fails to show any outgoing calls for December 11, 1972.

It is necessary that an extension of the Court Order issued for interception of KOTOCH's wire communica-

tions at telephone numbers (216) 777-0850 and (216) 777-0851, by Chief Judge FRANK J. BATTISTI, United States District Court, Northern District of Ohio, Eastern Division, on November 28, 1972, he obtained because:

1. Numerous individuals have called ALBERT KOTOCH to place wagers, receive wagers and to give and receive "line" information. More time is needed to determine the identity and the nature of the participation of these individuals in the Illegal Gambling Business which KOTOCH is conducting, evidence of which is being obtained, in part, by this wire interception.

2. During the interception period, KOTOCH has obtained and furnished football and basketball "line" information. KOTOCH has also accepted and laid off numerous wagers on football and basketball games; and more time is needed to determine the source of the football and basketball information used and disseminated by KOTOCH.

3. As set forth herein, interception of KOTOCH's conversations has revealed that KOTOCH discusses gambling business on a third telephone, number (216) 777-3850, which is not monitored. More time is needed for the two telephones currently being monitored in order to corroborate any outgoing calls, discussions of lay-off action on the third telephone, if authority is granted to intercept communications on the third telephone.

4. More time is needed to determine the identity of individuals with whom KOTOCH has been in contact, their places of operation and the full extent and nature of this conspiracy to violate Title 18, Section 1955 of the United States Code.

It is necessary to request that an order from this court should ensure to intercept wire communications from telephone number (216) 777-3850 that will not terminate upon the first interception that further reveals the manner which ALBERT KOTOCH, JOSEPH A. SPAGANLO, CHUCK (Last Name Unknown), (First Name Unknown) SLYMAN, GEORGE M. FLOREA, and others as yet unknown, participate in the illegal gambling business but continue until interception reveals the iden-

tities of those KOTOCH is contacting, their places of operation, or for a period of 15 days, from the date of this order, whichever is earlier, because:

1. As set forth herein, very few telephone calls intercepted on telephone numbers (216) 777-0850 and (216) 777-0851 are outgoing calls. As stated on Page 3 of the attached affidavit, in order for a bookmaker to balance his books, it is necessary for him to have another bookmaker with whom he can place bets which have unbalanced his books. This process is known as "laying off" and during the course of heavy betting activity such has been intercepted on AL KOTOCH's phones, KOTOCH must have available a telephone with which to call other bookmakers as rapidly as he can in order to "lay-off" any teams upon which he has received large bets.

2. Therefore, as set forth herein, probable cause exists that AL KOTOCH uses the third telephone present in Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, to place his outgoing "lay-off" telephone calls and receives his new "line" information.

3. It is necessary to monitor these outgoing telephone calls to determine the identity of individuals from whom KOTOCH receives his "line" information, and to whom KOTOCH lays off his larger bets.

Further, affiant sayeth not.

/s/ Richard L. Ault, Jr.
RICHARD L. AULT, JR.
Special Agent
Federal Bureau of Investigation

Sworn to before me, and subscribed in my presence, December 26, 1972.

/s/ Leroy J. Contie, Jr.
U.S. District Judge

Attached To The Affidavit Was A Copy Of Affidavit Of November 28, 1972. See Page 20 *Supra.*, For That Affidavit.

[Filed December 26, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR THE CONTINUED INTERCEPTION OF WIRE COMMUNICATIONS

ORDER AUTHORIZING CONTINUED INTERCEPTION OF WIRE COMMUNICATIONS

TO: Federal Bureau of Investigation
Department of Justice

Application under oath having been made before me by Steven R. Olah, an attorney with the Organized Crime and Racketeering Section, Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an Order authorizing the continued interception of wire communications pursuant to Section 2518, United States Code, based on the facts disclosed by said application and on the affidavit and supporting documents attached thereto, I make the following findings:

(a) There is probable cause to believe that Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown are commiting, have committed and are about to commit and are conspiring to commit an offense enumerated in Section 2516 of Title 18, United States Code, to wit: conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business which has been or remains in substantially continuous operation for a period in excess of thirty days in violation of Title 18, United States Code, Section 1955, and Section 371 of Title 18, United States Code.

(b) There is probable cause to believe that communications concerning these offenses will be obtained through the interception, authorization for which is applied for herein. In particular, communications will be intercepted concerning the placing and receiving of sports bets and action and the dissemination of "line" information.

(c) Normal investigative procedures reasonably appear to be unlikely to succeed if tried.

(d) There is probable cause to believe that the telephones numbered (216) 777-0850 and (216) 777-0851, both located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and both subscribed to by Richard Wellman have been used and are being used in connection with the commission of the above described offenses by Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others, as yet unknown.

WHEREFORE, it is hereby Ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to Application authorized by the Attorney General of the United States, the Honorable Richard G. Kleindienst, to exercise the power conferred on him by Section 2516 of Title 18, United States Code:

(1) To continue to intercept wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others, as yet unknown concerning the above described offenses to and from the telephones numbered (216) 777-0850 and (216) 777-0851, both located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and both subscribed to by Richard Wellman.

(2) Such interceptions shall not automatically terminate when the types of communications described above in paragraph (b) have first been obtained, but shall continue until communications are in-

tercepted which reveal the exact manner in which Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others, as yet unknown participate in the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business and which reveal the identities of their confederates and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDED THAT, this authorization to continue to intercept wire communications shall be executed as soon as practicable after signing of this order, shall be conducted in such a way as to minimize the interception of communications that are otherwise not subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDED ALSO, that Steven R. Olah shall provide the Court with a report on the 3rd and 10th days following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for criminal interception.

It is further ordered that the Ohio Bell Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the continued interception unobtrusively and with a minimum of interference with the services that such carrier is according to the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Ohio Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

/s/ L. J. Contie, Jr.
United States District Judge

Date—12/26/72

[Filed December 26, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR THE INTERCEPTION OF WIRE COMMUNICATIONS

ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

TO: Federal Bureau of Investigation
Department of Justice

Application under oath having been made before me by Steven R. Olah, an attorney with the Organized Crime and Racketeering Section, United States Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an Order authorizing the interception of wire communications pursuant to Section 2518, United States Code, based on the facts disclosed by said application and on the affidavit and supporting documents attached thereto, I make the following findings:

(a) There is probable cause to believe that Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others as yet unknown are committing, have committed and are about to commit and are conspiring to commit an offense enumerated in Section 2516 of Title 18, United States Code, to wit: conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business which has been or remains in substantially continuous operation for a period in excess of thirty days in violation of Title 18, United States Code, Section 1955, and Section 371 of Title 18, United States Code.

(b) There is probable cause to believe that communications concerning these offenses will be obtained through the interception, authorization for which is applied for herein. In particular, communications will be intercepted concerning the placing and receiving of sports wagers and action and the dissemination of "line" information.

(c) Normal investigative procedures reasonably appear to be unlikely to succeed if tried.

(d) There is probable cause to believe that the telephone numbered (216) 777-3850, located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and subscribed to by Richard Wellman, has been used and is being used in connection with the commission of the above described offenses by Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others, as yet unknown.

WHEREFORE, it is hereby Ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to Application authorized by the Attorney General of the United States, the Honorable Richard G. Kleindienst, to exercise the power conferred on him by Section 2516 of Title 18, United States Code:

(1) To intercept wire communications of Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others, as yet unknown concerning the above described offenses to and from the telephone numbered (216) 777-3850, located at Apartment 512, 25151 Brookpark Road. North Olmsted, Ohio and subscribed to by Richard Wellman.

(2) Such interceptions shall not automatically terminate when the types of communications described above in paragraph (b) have first been obtained, but shall continue until communications are intercepted which reveal the exact manner in which

Albert Kotoch, Joseph Anthony Spaganlo, Chuck (LNU), (FNU) Slyman, George M. Florea, and others, as yet unknown participate in the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business and which reveal the identities of their confederates and the nature of the conspiracy involved therein, or for a period of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDED THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order, shall be conducted in such a way as to minimize the interception of communications that are otherwise not subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDED ALSO, that Stephen R. Olah shall provide the Court with a report on the 3rd and 10th days following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continual interception.

It is further ordered that the Ohio Bell Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the application forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the Ohio Bell Telephone Company to be compensated for by the applicant at the prevailing rates.

/s/ L. J. Contie, Jr.
United States District Judge

DATE—December 26, 1972

[Filed December 29, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR THE CONTINUED INTERCEPTION OF WIRE COMMUNICATIONS AND THE INTERCEPTION OF WIRE COMMUNICATIONS

PROGRESS REPORT

Steven R. Olah, an attorney with the Organized Crime and Racketeering Section, of the United States Department of Justice, respectfully submits this report showing what progress has been made toward the achievement of the authorized objective and need for continued interception:

1. On December 26, 1972, at approximately 10:45 a.m., upon application of Steven R. Olah, filed on December 26, 1972, an Order was signed by this Court authorizing interception of wire communications to and from telephones numbered (216) 777-0850, (216) 777-0851, and (216) 777-3850. This report, filed on the third day following the date of the Order authorizing interception of wire communications and covering the first three days of interception is made in compliance with the terms of that Order and pursuant to the terms of 18 U.S.C., § 2518(6).

2. The progress toward achievement of the authorized objective is as follows:

a. December 26, 1972

(1) Telephone numbered (216) 777-0850—of 40 incoming calls, all were monitored, and one outgoing call was monitored; wagers totaling approximately $6,400 were placed.

(2) Telephone numbered (216) 777-0851—of 26 incoming calls, all were monitored, and $3,950 in bets were placed.

(3) Telephone numbered (216) 777-3850—of 15 incoming calls, all were monitored; of 22 outgoing calls, 21 were monitored; a total of $4,850 in bets were placed with ALBERT KOTOCH.

(b) December 27, 1972

(1) Telephone numbered (216) 777-0850—of 45 incoming calls, 44 were monitored, and $12,000 was wagered on sporting events.

(2) Telephone numbered (216) 777-0851—of 42 incoming calls, 42 were monitored; one outgoing call was monitored. Approximately $18,900 in bets were taken.

(3) Telephone numbered (216) 777-3850—of 8 incoming calls, 8 were monitored; of 10 outgoing calls, 10 were monitored. A total of $6,800 was wagered on sports bets. In addition, ALBERT KOTOCH received his sports "line" information over this telephone.

(c) December 28, 1972

(1) Telephone numbered (216) 777-0850—44 incoming calls, 43 were monitored; $4,800 was wagered.

(2) Telephone numbered (216) 777-0851—of 16 incoming calls, all were monitored, and concerned gambling; $4,300 was wagered during the course of monitoring on this date.

(3) Telephone numbered (216) 777-3850—of 14 incoming calls, 14 were monitored; of 22 outgoing calls, 22 were monitored. During the course of interception, approximately $12,450 was wagered in total. During the course of interception, lay-off activity between KOTOCH, VANIS RAY ROBBINS and JIMMY BLANK was noted. Additionally, KOTOCH was overheard receiving betting instructions from JOSEPH SPAGANLO.

3. Due to the fact that the gambling operation in question is an established business of a continuing nature, it is believed that additional communications of

the same type as those described in paragraph 2 above will continue to occur.

4. Continued interception is necessary for the following reasons:

(a) The identity of a lay-off bookmaker in Niles, Ohio, with whom AL KOTOCH deals, has not yet been established.

(b) KOTOCH receives line information from an Akron, Ohio bookmaker whose identity is yet undetermined.

(c) No activity between KOTOCH and GEORGE FLOREA has been noted to this date.

(d) AL KOTOCH has indicated during conversations that he is planning to move his bookmaking operation to a different apartment in the same building. The location of this new office is yet undetermined.

(e) The full scope of KOTOCH's operation, including the identities of other bookmakers with whom he deals, is still not determined.

Respectfully submitted,

/s/ Steven R: Olah
STEPHEN R. OLAH

DATE—12/29/72

[Filed January 5, 1973]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR THE CONTINUED INTERCEPTION OF WIRE COMMUNICATIONS AND THE INTERCEPTION OF WIRE COMMUNICATIONS

PROGRESS REPORT

Steven R. Olah, an attorney with the Organized Crime and Racketeering Section, of the United States Department of Justice, respectfully submits this report showing what progress has been made toward the achievement of the authorized objective and need for continued interception:

1. On December 26, 1972, at approximately 10:45 a.m., upon application of Steven R. Olah, filed on December 26, 1972, an Order was signed by this Court authorizing interception of wire communications to and from telephones numbered (216) 777-0850, (216) 777-0851, and (216) 877-3850. This report, filed on the tenth day following the date of the Order authorizing interception of wire communications and covering the fourth through the ninth days of interception is made in compliance with the terms of that Order and pursuant to the terms of 18 U.S.C., § 2518(6).

2. The progress toward achievement of the authorized objective is as follows:

a. December 29, 1972

(1) Telephone numbered (216) 777-0850—of 70 incoming calls, all were monitored, and no outgoing calls were monitored; wagers totaling approximately $31,500 were placed.

(2) Telephone numbered (216) 777-0851—of 39 incoming calls, all were monitored, and $11,650 in bets were placed.

(3) Telephone numbered (216) 777-3850—of 13 incoming calls, all were monitored; of 12 outgoing calls, 11 were monitored; a total of $7,400 in bets were placed.

b. December 30, 1972

(1) Telephone numbered (216) 777-0850—of 144 incoming calls, 144 were monitored; of 8 outgoing calls, 8 were monitored; and $37,900 was wagered.

(2) Telephone numbered (216) 777-0851—of 49 incoming calls, 49 were monitored; no outgoing calls were monitored. Approximately $11,500 in bets were taken.

(3) Telephone numbered (216) 777-3850—of 40 incoming calls, 38 were monitored; of 53 outgoing calls, 52 were monitored. A total of $7,400 was wagered.

c. December 31, 1972

(1) Telephone numbered (216) 777-0850—of 96 incoming calls, all were monitored; of 3 outgoing calls, 3 were monitored; $21,160 was wagered.

(2) Telephone numbered (216) 777-0851—of 46 incoming calls, all were monitored, and one outgoing call was monitored; $15,600 was wagered during the course of monitoring on this date.

(3) Telephone numbered (216) 777-3850—of 19 incoming calls, 19 were monitored; of 37 outgoing calls, 30 were monitored. During the course of interception, approximately $15,000 was wagered in total.

d. January 1, 1973

(1) Telephone numbered (216) 777-0850—of 15 incoming calls, all were monitored; of 10 outgoing calls, all were monitored; approximately $28,000 was wagered in total.

(2) Telephone numbered (216) 777-0851—of 55 incoming calls, all were monitored; of 2 outgoing calls, both were monitored; approximately $12,300 in bets were taken.

(3) Telephone numbered (216) 777-3850—of 18 incoming calls, all were monitored; of 54 outgoing calls, all were monitored; approximately $5,000 in bets were noted.

e. January 2, 1973

(1) Telephone numbered (216) 777-0850—of 42 incoming calls, all were monitored; no outgoing calls were noted; approximately $12,000 in bets were taken.

(2) Telephone numbered (216) 777-0851—of 12 incoming calls, all were monitored; of 6 outgoing calls, all were monitored; approximately $2,800 in bets were placed.

(3) Telephone numbered (216) 777-3850—of 11 incoming calls, 10 were monitored; of 13 outgoing calls, 11 were monitored; approximately $500 in wagers were placed.

f. January 3, 1973

(1) Telephone numbered (216) 777-0850—of 47 incoming calls, all were monitored; one outgoing call was monitored; approximately $3,150 in bets were placed.

(2) Telephone numbered (216) 777-0851—of 15 incoming calls, all were monitored; no outgoing calls were made; approximately $2,500 in bets were taken.

(3) Telephone numbered (216) 777-3850—of 7 incoming calls, all were monitored; of 19 outgoing calls, 12 were monitored; approximately $1,400 in bets were placed.

3. Interception was terminated on January 4, 1973, at approximately 8:00 p.m., after ten days of monitoring.

Respectfully submitted,

/s/ Steven R. Olah
STEVEN R. OLAH

DATE January 5, 1973

[Filed February 21, 1973]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR THE INTERCEPTION OF WIRE COMMUNICATIONS

ORDER DIRECTING SERVICE OF INVENTORY

To: Steven R. Olah, Attorney
U. S. Department of Justice
Cleveland, Ohio

This Court, having entered an Order on November 28, 1972, authorizing the interception of wire communications to and from the telephones numbered (216) 777-0850 and (216) 777-0851, located at 25151 Brookpark Road, Apartment 512, North Olmsted, Ohio; and (216) 453-6114 and (216) 452-1624, located at 204 Broad Avenue, N.W., Canton, Ohio for a fifteen (15) day period; and this Court having entered an Order on December 26, 1972, authorizing the interception of wire communications to and from the telephones numbered (216) 777-0850, (216) 777-0851 and (216) 777-3850, located at 25151 Brookpark Road, Apartment 512, North Olmsted, Ohio, for a fifteen (15) day period, pursuant to the provisions of Section 2518, Title 18, United States Code, upon the ex-parte application of the United States of America, it is ORDERED, pursuant to the provisions of Section 2518 (8)(d), that you cause a copy of the inventory to this Order to be served, by depositing such copy in the United States mail, certified or registered mail, return receipt requested, on or before February 26, 1972, on each of the following persons, addressed to each such person at his last known mailing address:

GEORGE FLOREA
NICK PETERS
JOSEPH DELIO

JOSEPH REA
MAURICE SULLIVAN
JOHN TSANGEOS
RAYMOND PAUL VARA
ROBERT COMBS
SAM NOTTURNO
LEONARD GIACAMO
ALBERT L. KOTOCH
ERNEST CHICKENO
JOSEPH SPAGANLO
SUZANNE VERES
ELLEN MILNER
JOSEPH SLYMAN
JAMES GIRARD
GEORGE SIDORIS
ANDREW OKULAVICH
JAMES L. NEALE
LOUIS GLASSMAN
SANFORD GLASSMAN
CHARLES MOORE
DOMINIC BUZZACCO
JACK LORENZETTI
PASQUALE CISTERNINO
LEO TRANKITO
JOHN VITANTONIO
HERMAN TROCCHIO
DAN TAYLOR
EDMUND KOTOCH
THOMAS DONOVAN
VANIS RAY ROBBINS
EDWARD TACKLA
DANIEL SHEA
PAT MURTON
AL WEINER

/s/ Frank J. Battisti
United States District Judge

DATED: Feb. 21, 1973

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

APPLICATION OF THE UNITED STATES OF AMERICA
IN THE MATTER OF AN ORDER AUTHORIZING THE
INTERCEPTION OF WIRE COMMUNICATIONS

INVENTORY

Pursuant to the requirements of Section 2518(8)(d) of Title 18, United States Code, notice is hereby given that:

1. An Order authorizing the interception of wire communications to and from the telephones subscribed to by Richard Wellman, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and bearing the numbers (216) 777-0850 and (216) 777-0851; the telephone subscribed to by Annette Florea, 204 Broad Avenue, N.W., Canton, Ohio, and bearing the number (216) 453-6114; and the telephone subscribed to by Margaret Delerba, 204 Broad Avenue, N.W., Canton, Ohio, and bearing the number (216) 452-1624 was entered by the United States District Court for the Northern District of Ohio, Eastern Division.

2. The Order authorizing the interception of wire communications to and from the telephone facilities described above was signed on November 28, 1972; said interception to continue for a period of fifteen days from that date. Interception over telephone number 453-6114 was discontinued on December 7, 1972; interception over telephones numbered 777-0850, 777-0851, and 452-1624 was discontinued on December 12, 1972.

3. An Order authorizing the continued interception of wire communications to and from the telephones subscribed to by Richard Wellman, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and bearing the numbers (216) 777-0850 and (216) 777-0851; and authorizing the interception of wire communications to and from the telephone subscribed to by Richard Wellman, Apartment 512, 25151 Brookpark Road, North Olmsted,

Ohio, and bearing the number (216) 777-3850 was entered by the United States District Court for the Northern District of Ohio, Eastern Division.

4. The Order authorizing the interception of wire communications to and from the telephone facilities described above was signed on December 26, 1972; said interception to continue for a period of fifteen days from that date. Interception was discontinued on January 4, 1973.

5. During the periods referred to in paragraphs 2 and 4 above, wire communications were intercepted.

/s/ Steven R. Olah
STEVEN R. OLAH
Special Attorney
U. S. Department of Justice
Cleveland, Ohio

[Filed September 11, 1973]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

APPLICATION OF THE UNITED STATES OF AMERICA
IN THE MATTER OF CERTAIN ORDERS AUTHORIZING
THE INTERCEPTION OF WIRE COMMUNICATIONS

MOTION FOR AMENDED ORDER
DIRECTING SERVICE OF INVENTORY

Comes now the United States of America, appearing through its Attorneys, and represents to this Court the following:

1. An Order authorizing the interception of wire communications to and from the telephones subscribed to by Richard Wellman, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and bearing the numbers (216) 777-0850 and (216) 777-0851; the telephone subscribed to by Annette Florea, 204 Broad Avenue, N.W., Canton, Ohio, and bearing the number (216) 453-6114; and the telephone subscribed to by Margaret Delerba, 204 Broad Avenue, N.W., Canton, Ohio, and bearing the number (216) 452-1624 was entered by the United States District Court for the Northern District of Ohio, Eastern Division.

2. The Order authorizing the interception of wire communications to and from the telephone facilities described above was signed on November 28, 1972; said interception to continue for a period of fifteen days from that date. Interception over telephone number 453-6114 was discontinued on December 7, 1972; interception over telephones numbered 777-0850, 777-0851, and 452-1624 was discontinued on December 12, 1972.

3. An Order authorizing the continued interception of wire communications to and from the telephones subscribed to by Richard Wellman, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and bearing the numbers (216) 777-0850 and (216) 777-0851; and authorizing the interception of wire communications to and from the telephone subscribed to by Richard Wellman, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and bearing the number (216) 777-3850 was entered by the United States District Court for the Northern District of Ohio, Eastern Division.

4. The Order authorizing the interception of wire communications to and from the telephone facilities described in paragraph (3) above was signed on December 26, 1972; said interception to continue for a period of fifteen days from that date. Interception was discontinued on January 4, 1973.

5. Pursuant to the provisions of Section 2518(8)(d), Title 18, United States Code, which requires, *inter alia*, that not later than ninety (90) days after termination of the period of authorized interception an inventory be served upon the parties whose conversations were monitored, Chief Judge Frank J. Battisti signed an "Order Directing Service of Inventory" on February 21, 1973.

6. Pursuant to the provisions of the aforementioned inventory Order, copies of said inventory (a copy of which is attached) were mailed to thirty-seven (37) persons positively identified during the period of authorized interception on February 22, 1973. These inventories were deposited in the United States mail, return receipt requested. The ninetieth day after the termination of interception was March 12, 1973.

7. During the week which commenced August 27, 1972, counsel for the Government discovered that by reason of an administrative oversight, Harvey Trifler, 6871 Drexel Drive, Seven Hills, Ohio 44131, and James Blank, 13400 Oak Park, Garfield Heights, Ohio 44125, parties whose conversations were overheard pursuant to the Court Ordered interception of wire communications described in paragraphs (1) through (4) above, were not served with an inventory pursuant to the "Order Directing Service of Inventory" described in paragraph (5) above.

8. The Government contends that it has at all times attempted to comply in good faith with both the Inventory Order of Chief Judge Battisti and the requirements of Title 18, United States Code, Section 2518(8)(d). However, in an effort to meet all its obligations to this Court

regarding the electronic surveillance in question, including the right of Mr. Trifler and Mr. Blank to receive adequate notice that their communications were intercepted, the Government respectfully moves this Honorable Court for an Amended Order Directing Service of Inventory to be served on Mr. Trifler and Mr. Blank by United States Certified Mail, Return Receipt Requested.

Respectfully submitted,

FREDERICK M. COLEMAN
United States Attorney

By: /s/ David Margolis
DAVID MARGOLIS

/s/ Edwin J. Gale
EDWIN J. GALE
Special Attorneys
Criminal Division
United States Department of Justice

[Attached To Motion]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

INVENTORY

Pursuant to the requirements of Section 2518(8)(d) of Title 18, United States Code, notice is hereby given that:

1. An Order authorizing the interception of wire communications to and from the telephones subscribed to by Richard Wellman, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and bearing the numbers (216) 777-0850 and (216) 777-0851; the telephone subscribed to by Annette Florea, 204 Broad Avenue, N.W., Canton, Ohio, and bearing the number (216) 453-6114; and the telephone subscribed to by Margaret Delerba, 204 Broad Avenue, N.W., Canton, Ohio, and bearing the number (216) 452-1624 was entered by the United States District Court for the Northern District of Ohio, Eastern Division.

2. The Order authorizing the interception of wire communications to and from the telephone facilities described above was signed on November 28, 1972; said interception to continue for a period of fifteen days from that date. Interception over telephone number 453-6114 was discontinued on December 7, 1972; interception over telephones numbered 777-0850, 777-0851, and 452-1624 was discontinued on December 12, 1972.

3. An Order authorizing the continued interception of wire communications to and from the telephones subscribed to by Richard Wellman, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and bearing the

numbers (216) 777-0850 and (216) 777-0851; and authorizing the interception of wire communications to and from the telephone subscribed to by Richard Wellman, Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and bearing the number (216) 777-3850 was entered by the United States District Court for the Northern District of Ohio, Eastern Division.

4. The Order authorizing the Interception of wire communications to and from the telephone facilities described above was signed on December 26, 1972; said interception to continue for a period of fifteen days from that date. Interception was discontinued on January 4, 1973.

5. During the periods referred to in paragraphs 2 and 4 above, wire communications were intercepted.

/s/ Steven R. Olah
STEVEN R. OLAH
Special Attorney
U. S. Department of Justice
Cleveland, Ohio

[Filed September 11, 1973]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF CERTAIN ORDERS AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

AMENDED ORDER DIRECTING SERVICE OF INVENTORY

This cause having come up upon Motion by the United States of America, through its Attorneys, David Margolis and Edwin J. Gale, this Court finds that the provisions of Title 18, United States Code, Section 2518(8)(d) which requires, *inter alia*, that not later than ninety days after termination of an authorized electronic interception (18, United States Code, Section 2516, *et seq.*) an inventory be served upon the persons whose conversations were monitored, were complied with in good faith by the United States when those inventories were deposited in the United States mail, certified mail, return receipt requested, on February 22, 1973; and that the "Order Directing Service of Inventory", signed by Chief District Judge Frank J. Battisti, on or about February 21, 1973, was complied with in good faith by the United States when the aforementioned mailings were made.

This Court further finds that by reason of an administrative oversight, which was recently discovered by the Government, Mr. Harvey Trifler and Mr. James Blank, parties who have been positively identified as persons overheard during authorized wire interceptions of communications which were ordered by this Court, were not served inventories pursuant to the above-described "Order Directing Service of Inventory", and, it is

HEREBY ORDERED, in the interests of Justice, that inventories identical to that attached to the February 21, 1973 "Order Directing Service of Inventory", signed by Chief District Judge Frank J. Battisti, Northern District of Ohio, be mailed, certified mail, return receipt requested, to Harvey Trifler, 6871 Drexel Drive, Seven Hills, Ohio 44131, and James Blank, 13400 Oak Park, Garfield Heights, Ohio 44125.

IT IS FURTHER ORDERED that the Government's Motion and the Amended Order directing service of the inventory be sealed and placed in the custody of this Court.

/s/ Frank J. Battisti
United States District Court
Judge
September 11, 1973

[Filed December 12, 1973]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGE KRUPANSKY

No. CR73-600

[Filed Dec. 12, 11:00 a.m., '73, Clerk, U.S. District Court, Northern District of Ohio]

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

ALBERT KOTOCH, ET AL., DEFENDANTS

MOTION TO SUPPRESS

Defendant Jacob Joseph Lauer now comes and moves the court for an order suppressing all evidence which may have been received as a result of the interception of wire communications and/or electronic surveillance under application and order dated November 28, 1972, and also under application and order dated December 26, 1972, for the reasons that as to the application and order dated November 28, 1972, said application and order was not in compliance with Section 2516(1) of Title 18 U.S.C., which required that the Attorney General or an Assistant Attorney General specially designated by the Attorney General authorize the application to the court, and that as to the application and order dated December 26, 1972, there has been no compliance with Section 2518(4)(a) of Title 18 U.S.C. in that this defendant was not named in the order, and that as to the application and order dated November 28, 1972, and also under application and order dated December 26, 1972, this defendant has not been served with notice of

inventory in accordance with 2518(8)(d) of Title 18, U.S.C.

Defendant respectfully requests oral argument.

Respectfully submitted,

BUCKINGHAM, DOOLITTLE & BURROUGHS

By /s/ Bradford M. Gearinger
BRADFORD M. GEARINGER
Attorneys for Defendant
Jacob Joseph Lauer
1500 Akron Center Building
I Cascade Plaza
Akron, Ohio 44308
Phone: (216) 535-2661

[Filed December 12, 1973]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGE KRUPANSKY

No. CR73-600

[Filed Dec. 12, 11:00 a.m., '73, Clerk, U.S. District Court, Northern District of Ohio]

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

ALBERT KOTOCH, ET AL., DEFENDANTS

MOTION TO SUPPRESS

Defendant Joseph Francis Merlo now comes and moves the court for an order suppressing all evidence which may have been received as a result of the interception of wire communications and/or electronic surveillance under application and order dated November 28, 1972, and also under application and order dated December 26, 1972, for the reasons that as to the application and order dated November 28, 1972, said application and order was not in compliance with Section 2516(1) of Title 18 U.S.C., which required that the Attorney General or an Assistant Attorney General specially designated by the Attorney General authorize the application to the court, and that as to the application and order dated December 26, 1972, there has been no compliance with Section 2518(4)(a) of Title 18 U.S.C. in that this defendant was not named in the order, and that as to the application and order dated November 28, 1972, and also under application and order dated December 26, 1972, this defendant has

not been served with notice of inventory in accordance with 2518(8)(d) of Title 18, U.S.C.

Defendant respectfully requests oral argument.

Respectfully submitted,

BUCKINGHAM, DOOLITTLE & BURROUGHS

By /s/ Bradford M. Gearinger
BRADFORD M. GEARINGER
Attorneys for
Joseph Francis Merlo
1500 Akron Center Building
I Cascade Plaza
Akron, Ohio 44308
Phone: (216) 535-2661

[Filed December 12, 1973]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGE KRUPANSKY

Case No. CR 73-600

[Filed Dec. 12, 3:13 p.m., '73, Clerk, U.S. District Court, Northern District of Ohio]

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

VANIS RAY ROBBINS, ET AL., DEFENDANT

SUPPLEMENTAL MOTION TO SUPPRESS AND REQUEST FOR ORAL HEARING AND ARGUMENT

Now comes the defendant, Vanis Ray Robbins, by and through his attorney, Robert Wm. Ent, and moves the Court for an order suppressing all evidence which may have been received as a result of the interception of wire communications and/or other electronic surveillance under application and order dated November 28, 1972, and also under application and order dated December 26, 1972 for the reasons that as to the application and order dated November 28, 1972, said application and order was not in compliance with Section 2516 (1) of Title 18 U.S.C. which required that the Attorney General or an Assistant Attorney General specially designated by the Attorney General authorize the application to the Court, and that as to the application and order dated December 26, 1972 there has been no compliance with Section 2518

(4) (a) of Title 18 U.S.C. in that this defendant was not named in the Order.

Respectfully submitted,

/s/ Robert W. Ent
ROBERT WM. ENT
Second Floor Annex
914 Main St.
Cincinnati, Ohio 45202
A/C 513, 381-0025

and _____
Counsel for defendant

Vanis Ray Robbins

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 73-600

[Filed Dec. 28, 3:31 p.m., '73, Clerk, U.S. District Court, Northern District of Ohio]

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

ALBERT KOTOCH, ET AL., DEFENDANTS

SUPPLEMENTAL MOTION TO SUPPRESS AND CONTROVERT SEARCH WARRANT

Now comes the defendants, Harvey Trifler, Ernest Chickeno, George Frank Sidoris, Joseph Slyman, James Neil Girard, Thomas W. Donovan and Albert Kotoch, by and through their attorneys and move the Court for an order suppressing all evidence which may have been received as a result of the interception of wire communications and/or other electronic surveillance under application and order dated November 28, 1972, and also under application and order dated December 26, 1972. In support of this motion, defendants state the following grounds:

1. The application and order dated November 28, 1972, was not in compliance with Section 2516 (1) of Title 18 U.S.C. which required that the Attorney General or an Assistant Attorney General specially designated by the Attorney General authorize the application to the Court.

2. The application and order dated December 26, 1972 does not comply with Section 2518 (4) (a) of Title 18 U.S.C. in that all known defendants were not named in the Order and further, that said application was a

direct result of the illegality of the November 28th application and order.

Respectfully submitted,

Elmer A. Giuliani
ELMER A. GIULIANI

Frederick K. Jurek
FREDERICK K. JUREK

Ralph D. Sperli
RALPH D. SPERLI

Christopher F. Nardi
CHRISTOPHER F. NARDI

Frank K. Isaac
FRANK K. ISAAC
410 Leader Building
Cleveland, Ohio 44114
241-0520

Attorneys for Defendants

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Criminal Action No. CR 73-600

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ALBERT KOTOCH, ET AL., DEFENDANTS

HEARING ON SUNDRY MOTIONS BEFORE HONORABLE ROBERT B. KRUPANSKY COMMENCING AT 10:00 A.M., MONDAY, JANUARY 14, 1974.

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[2] APPEARANCES:

On behalf of the Plaintiff:

Mr. Edwin J. Gale and
Mr. Fred Clervi,
Special United States Attorneys.

On behalf of Defendant Albert Kotoch:

Mr. Frank K. Isaac.

On behalf of Defendant Joseph A. Spaganlo:

Gold, Rotatori, Messerman & Hanna, by Mr. Robert J. Rotatori.

On behalf of Defendants Harvey Trifler and Ernest Chickeno:

Mr. Frederick K. Jurek.

On behalf of Defendants Joseph Slyman and James Neil Girard:

Mr. Ralph Sperli.

On behalf of Defendant George Frank Sidoris:

Mr. Elmer A. Giuliani.

On behalf of Defendants Louis Glassman and Sanford Glassman:

Mr. Joseph A. Dubyak.

On behalf of Defendant Dominic R. Buzzacco:

Mr. Carmen A. Policy.

On behalf of Defendants Jack Lorenzetti and Michael Malvasi:

Niki Z. Schwartz.

On behalf of Vanis Ray Robbins:

Mr. Robert W. Ent.

[3] On behalf of Defendant Thomas W. Donovan:

Mr. Christopher F. Nardi.

On behalf of Defendant James Blank:

Mr. Jerry Milano.

On behalf of Defendants Jacob Joseph Lauer and Joseph Francis Merlo:

Mr. Bradford Gearinger.

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* * * *

[97] RECROSS EXAMINATION OF
RICHARD L. AULT, JR.

BY MR. NARDI:

Q Mr. Ault, calling your attention to the interception on the 28th of November, which I believe was concluded on the 12th of December, you indicated that you had, on occasion, monitored incoming and outgoing calls from the 777 numbers; is that true?

A Yes, sir.

Q And you had occasion to investigate the logs and the documents drawn up by other people on your staff that had monitored those calls?

A That is right, sir.

Q During that period of time, were any new names acquired by you or your staff aside from those initially named in your first application?

A Yes, sir.

Q If you recall, could you name those people.

A Slyman and Girard. Let's see. George Sidoris. [98] I think—I believe Louis and Sanford Glassman, Vanis Ray Robbins, Thomas Donovan.

Now, you are talking about just the 777 phones or the—based upon what we learned—

Q 777.

A Well, Buzzacco, Dominic Buzzacco.

That would—and Jack Lorenzetti.

I believe that would be all.

Q Then you would say at the time of your application of December 26, these gentlemen were known to you?

A I would say that they were known by part of their name or all of their name.

Q Either code or by their actual identity?

A In some way, they had been identified.

Q They were known parties?

A Right. Right. I would say so.

* * * *

[120] (REDIRECT EXAMINATION OF
RICHARD L. AULT, JR.)

BY MR. GALE:

Q There are two affidavits in that exhibit; is that correct?

A Yes, sir.

Q And will you explain, please, to the Court the purpose of two affidavits—

THE COURT: I know what it is. It is a supplemental affidavit.

Proceed.

Q And the affidavit which you filed with Judge Contie incorporated the first affidavit; is that correct?

A That is correct.

Q And those affidavits are in support of an application for an order which was eventually given on December 26, 1972; is that correct?

A That is correct.

Q Now, did you, in gathering the information for those affidavits, include the known identities of all those, to the best of your knowledge, that would be overheard during the interception which you [121] hoped to obtain by reason of the order of December 26?

THE COURT: Read that question back to me, please.

(The last question was read by the reporter.)

A Yes, sir.

Q So you didn't leave out anybody that you knew or had reason to believe would be intercepted?

A No, sir, I don't believe I did.

Q Now, a few minutes ago I believe your testimony was that after the completion of the first electronic surveillance and pursuant to the order of November 28, 1972, you knew Mr. Sidoris would be overheard.

Was he named in your affidavit of December 26?

A I can't be sure unless I look.

(Pause.)

MR. ROTATORI: Judge, may I enter an objection? I believe the document speaks for itself, and Mr.—

MR. MILANO: I can't hear you.

MR. ROTATORI: I'm entering an [122] objection. The question is whether a name appears in the affidavit.

I believe the document speaks for itself.

THE COURT: That is right. Sustained.

Q Your testimony is, though, if you knew someone was likely to be intercepted pursuant to the order you hoped to get on December 26, his name would be in that affidavit?

A Yes, sir.

MR. ENT: Objection.

THE COURT: Sustained.

Q Would there be any reason why—

THE COURT: Sustain the objection to the question by Mr. Ent.

Q Now, you stated as a result of the first electronic surveillance commenced November 28, that by reason of that interception, Mr. Sidoris was identified. Do you recall that testimony?

A Yes, sir.

MR. GIULIANI: Objection.

THE COURT: Overruled.

Q Is that testimony correct?

[123] A I believe it was, yes, sir.

Q You have also testified that—

THE COURT: There is no need to be repetitious. I have that down here. He testified that as a result of the first interception, he included the names of various other people, including Slyman, Girard, Sidoris, the Glassmans, Donovan, Robbins, Buzzacco, and Lorenzetti.

I have that down here.

Ask some more questions.

MR. GALE: Yes, your Honor.

Q Why did you not name Mr. Sidoris, Mr. Girard, Mr. Louis Glassman, Mr. Donovan, Mr. Buzzacco, or Mr. Lorenzetti in your second affidavit dated December 26th?

A I asked if I could recall the names of the individuals that I had identified in the first, and with no supporting documents, I took a guess. This is—I mean, it was what I thought was accurate.

But if they are not in here, then I was not.

Q Excuse me?

A I say if they are not in here, if they are not named, then I was not, I was not accurate.

[124] In other words, we had possibly, during the course of the first interception, come across the individual and knew his voice, but had not yet fully identified him at that time. I mean at the time of the second application.

In that case, we would have left him out.

Q Is it a fair statement to say that if you knew the names of the people thought to be intercepted, their names appear in your affidavit?

A Yes.

MR. NARDI: Objection, your Honor.

THE COURT: Sustained. It is leading.

* * * *

[135] FURTHER RECROSS EXAMINATION
OF RICHARD L. AULT, JR.

BY MR. SPERLI:

Q Mr. Ault, you made application for a continuing electronic surveillance on December 26; is that correct?

A Yes, sir.

Q And practically everything that is contained in that affidavit were those items that you learned from the wire tap that was authorized on November 26; is that correct?

A Say that again. I'm sorry.

Q Practically everything that you recited in your supplemental affidavit on December 26 were items that you learned of during the electronic surveillance that was authorized on November 28th?

A Yes, sir.

Q When you applied for the authorization on December 26, at that time you knew of the identity of James Girard; is that correct?

A Yes, sir. I must have had some idea of—well, I can't say. I'm sure I must have had some idea that he was out there as No. 22. But whether I had identified him yet as James Girard, I don't know. I mean, I have nothing—this is quite an [136] extensive case, and I can't recall just out of hat whether or not I had or had not.

Q Well, it is a fair statement, is it not, that in your application of the 26th of December, in any reference you made by whatever fashion of either Mr. Girard or Mr. Slyman, the information that you used in applying for that application was information that you learned of because of the electronic surveillance from November 28; is that correct?

A I believe so, yes, sir. That is a fair statement.

MR. SPERLI: All right. I have nothing further.

THE COURT: Thank you, Mr. Sperli.

MR. NARDI: Nothing, your Honor.

THE COURT: Mr. Giuliani?

MR. GIULIANI: Yes, your Honor.

* * * *

[144] (FURTHER RECROSS EXAMINATION
OF RICHARD L. AULT, JR.)

* * * *

Q Now, getting to the other matter in terms of your having knowledge of certain individuals prior to the second application for a wire tap on December 26, 1972, I understand from search warrants and so forth that you checked with the Ohio Bell Telephone Company concerning certain telephone numbers; is that correct?

A Yes, sir.

Q When you checked with the Ohio Bell Telephone Company concerning certain telephone numbers, did you check into the long distance call journal as relating to those numbers?

A I don't know if it would be called a long distance call journal. I'm not sure—I'm not even [145] familiar with that term.

Q Maybe the term is improper. Let me just put it in sort of fundamental terms.

Did you check those numbers and see if any long distance calls were made to or from those numbers?

A Yes, sir. That would be part of obtaining the records normally in the course of the investigation.

Q Was this investigation done prior to any application to any Court for a wire tap?

A On several occasions during the course of this investigation, various phone numbers would come to our attention and we would request the long distance records, yes. I would request them.

Q Am I to understand, then, that your answer is yes?

A Yes.

Q All right. Did you retain a record of the long distance calls made to and from those particular numbers?

A We obtained, yes, records that were presented to us.

Q Correct.

A Right.

Q You retained a copy of that record?

A Yes.

[146] Q I assume you have that record as part of your file?

A I imagine so, yes, sir.

Q Prior to applying for any wire tap with any Court, could you tell me if there were any long distance calls to or from Niles, Ohio relating to any of the numbers you checked?

A Can you—you mean—I don't think I understand the question.

You mean in my investigations, did any of my records that I obtained from the phone company reflect phone calls from the number I was interested in to Niles, Ohio?

Q Yes, sir.

A Yes, sir.

Q Did you conduct further investigation into those numbers in Niles, Ohio?

A Yes, sir, I did.

Q Now, I'm relating myself strictly to that period of time prior to your applying for a wire tap. Do you understand what I'm saying?

A Yes, sir.

Q All right. Now, in the course of that investigation relating to the Niles, Ohio phone calls, did you come up with an address?

[147] A Yes, sir, I'm sure we did.

Q Did you conduct an investigation in terms of that address?

A We had several addresses, as I recall. I think initially, the phone numbers that we obtained in Niles belonged on a different—or were not only different numbers, but were listed to a different address than at the

time immediately prior to the time I got the application or submitted the affidavit to the strike force.

Q Well, I'm referring now to the Niles, Ohio address, and if you will bear with me just one second, I will find it here in a second.

(Pause.)

Q I believe it is on Park Avenue.

Are you familiar with the address?

A 15½ East Park.

Q Yes. That is exactly it.

A Yes.

Q Referring to that address, did you learn or were you directed to that address, 15½ Park Avenue, Niles, Ohio, as a result of checking out these long distance calls that I have referred to?

A Yes, sir, as I recall.

Q Was any surveillance conducted of that particular [148] address, 15½ Park Avenue, Niles, Ohio?

A Prior to the—gee, I couldn't say. I don't recall. I imagine there was, but offhand, I can't recall.

Q Well, you wouldn't have stopped your investigation short; am I correct, Mr. Ault?

A Oh, no, sir.

Q You would have carried through with your investigation; am I correct, Mr. Ault?

A I would have requested it.

Q And part of your normal carrying through procedure would have been a request on your part to continue a surveillance of that address?

A If it were feasible, yes.

As I understand it, it was related to me, in fact, that that was a rather hard address to surveil.

Q In what respect, sir?

A It was difficult for the agents in the Youngstown resident agency to remain in that area for any length of time without being identified as FBI agents and the word being passed up and down the street.

Q Some surveillance was conducted at that address, though; am I correct?

[149] A As I recall, yes, sir.

Q Was that surveillance conducted during the month of November, 1972?

A I don't believe so.

This is still prior to the application?

Q Forgetting about the application. Just address yourself to my question.

A In November, 1972, I couldn't say. I don't have any records to tell me.

I would doubt it, but I don't know.

Q Mr. Ault, I would assume that you, being in charge of this case, have the file on the case; is that correct?

A Yes, sir.

Q Does your file relate dates and times of surveillance?

A My file is some thousand pages. It reflects a number of facts. Among these is the information you would like.

Q Your answer is yes, then; is that correct?

A Right.

Q Would your file help you better in terms of testifying here on this motion for suppression?

A My files—certain items from my files probably would, yes.

[150] Q All right. You are not aware at this time as to the date of surveillance of that 15½ Park Avenue, Niles, Ohio; is that correct?

A I have no idea what dates, exact dates that place was surveilled.

Q As a result of that surveillance, you became aware or the FBI became aware of the existence of Mr. Dominic Buzzacco; is that correct?

A Yes, sir.

Q Were you aware of Mr. Buzzacco in terms of this case, the activity surrounding this case, prior to that surveillance?

A Pertaining to this case?

Q Yes.

A That is a difficult question to answer simply because I'm aware of a number of individuals and their activities long before any concrete case is brought to Court.

Q Let's put it this way. Did you feel or suspect that Dominic Buzzacco was somehow involved in all these transactions prior to applying for a wire tap?

A Gee, I don't think so. I certainly didn't, as I recall, say in my affidavit.

Q Well, I'm not asking you that. What I'm asking you [151] is what your suspicions were prior to applying.

A My suspicions?

Q Yes.

A Yes, sir.

Q And what were those suspicions based on?

A Things that were related to me by other agents of the FBI.

Q What things?

A Items of information as related to me that Dominic Buzzacco and Jack Lorenzetti had, in the past, operated a bookmaking operation.

Q Did they tell you where they operated a bookmaking operation?

A Yes, sir. I don't recall the address.

When I initially started conducting my investigation prior to that, it was different from 15½ East Park.

MR. POLICY: Your Honor, might I respectfully request the right to recall Special Agent Ault at a later time with his file for purposes of finding out more detailed information relating to the subject matter of which I'm examining now?

THE COURT: Yes. The Court will reserve a ruling on that, and if it [152] becomes necessary to recall, you will be permitted to recall him.

MR. POLICY: Thank you, your Honor.

* * * *

FURTHER RECROSS EXAMINATION OF
RICHARD L. AULT, JR.

BY MR. MILANO:

Q Now, we are talking about, Richard, about the search warrant itself.

You recall you signed the affidavit seeking the search warrant in this case; is that right?

A Yes, sir.

Q Now, in that—and I will refer you to Page 3.

A I don't have a copy of it here.

* * * *

[154] MR. MILANO: No, sir. This is the affidavit seeking a search warrant in all places that were ultimately searched.

I'm sure it is in your file, but it is not in evidence. If you like, I could have it marked. But I have all of my notes on it.

THE COURT: Well, Mr. Milano, I have 19 applications for search warrants. Which one are you referring to? Would you refer to it by the number.

MR. MILANO: United States of America versus Apartment 202, 5303 Northfield Road, Bedford Heights, Ohio, and further referred to as M 73-56.

THE COURT: Very well. I have it now.

BY MR. MILANO:

Q Now, showing you Page 3, start there in Paragraph 4, would you, please, and read that to the Court.

A "On November 28, 1972, I received a Court order from the United States District Court, Northern District of Ohio, Eastern Division, signed by United States District Judge Frank J. Battisti to [155] intercept wire communications of telephone numbers (216) 777-0850 and (216) 777-0851 located at Apartment 512, 25151 Brookpark Road, North Olmsted, Ohio, and telephone numbers (216) 452-1624 and (216) 453-6114, located at 204 Broad Avenue, Northwest, Canton, Ohio."

Q The November 28 Court order you are talking about, then, reverts back to the order that we are talking about in reference to the unsigned application for the wire taps, is that correct?

A Yes, sir.

Q Now read the next line. What does it say there?

A "The subjects of this interception were Albert Kotoch, Joseph Anthony Spaganlo, Ernest Chickeno, Ray

Vara, George Florea, Suzanne Veres, and others at that time unknown."

Q Doesn't that indicate to you that the only people you knew about prior to the 28th were those that are named right there?

A No, sir. It says "The subjects of this interception."

Q Yes. Go ahead.

A "And others at that time unknown."

Q "At that time unknown"? Isn't that what it says there?

[156] A Right.

* * * *

[256] THE COURT: Mr. Gearinger, you have filed two Motions to Suppress, one on behalf of Joseph Francis Merlo and one on behalf of Jacob Joseph Lauer, both of which are substantially the same in form and in content.

The Court will consolidate your motions.

Is there anything other than a legal argument that you are desirous of presenting in support of your motion, sir?

MR. GEARINGER: Your Honor, perhaps just a short stipulation, if it would meet with the pleasure of the U.S. attorney, to avoid having to call a witness [257] merely for a procedural aspect of my motion.

My proposed stipulation would be that the file of the U.S. attorney reveals an absence of any green return receipt of any attempted delivery of Notice of Inventory to either Mr. Merlo or Mr. Lauer.

I think the record clearly shows already, your Honor, that neither in the original application for Notice of Inventory, nor in the supplemental application, where two additional names were shown, do the names Merlo or Lauer appear.

So I think the only—

THE COURT: Well, Mr. Gearinger, the Court is perfectly amenable to accepting any stipulation which you and the Government are willing to enter into.

MR. GEARINGER: Thank you.

THE COURT: That is a problem between you and the Government, and certainly after we conclude the

hearing this evening, you may confer with the Government and draft a stipulation wihch you may present to the Court in the morning.

MR. GEARINGER: Your Honor, we [258] went over this at noon. I did with Mr. Gale.

THE COURT: Well, please draft your stipulation, and let's not encumber these proceedings with doing something that should have been done before we commenced today.

Now, is there anything further that you are desirous of presenting?

MR. GEARINGER: Nothing further, your Honor.

THE COURT: Thank you, Mr. Gearinger.

Mr. Gale, you will confer with Mr. Gearinger and draft the necessary stipulation and present it to the Court.

* * * *

[293] MR. POLICY: I respectfully move your Honor that any and all evidence obtained as a result of the wire or communications interceptions as it may relate to Mr. Buzzacco be suppressed for the additional reason that [294] he was not listed in any of the requests for the interceptions when the Government had knowledge of the fact that his conversations would be intercepted.

THE COURT: Very well. Your motion is noted.

* * * *

[303] MR. GALE: Your Honor, at this time, for the record, I would like to note that the Government did not receive, to the best of my knowledge, the motions filed by Mr. Gearinger on behalf of Defendants Merlo and Lauer with regard to [304] the designation issue and the inventory.

However, we believe that the responses that we have filed address those issues sufficiently.

THE COURT: Very well. Proceed with your case.

MR. GALE: We would be calling Mr. Steven Olah.

* * * *

[317] (DIRECT EXAMINATION OF STEVEN R. OLAH

Q I understand. Now, with respect to the service of inventories, how did you reach a conclusion to serve an inventory on a certain individual?

A Persons who were positively identified during the course of the electronic intercept were served with the inventory.

Q And how did you derive that type of information?

A This information was supplied to me by Special Agent Ault.

Q And approximately how many inventories were sent out?

A I really couldn't answer that.

If I was able to examine my inventory from the previous exhibit, I could tell you exactly.

Q Tell the Court when you served the inventory pursuant to the judge's order, how was that notification sent out?

A By registered, certified mail.

Q Out of your office?

A Out of my office, yes.

Q Now, did you receive any returns back with respect to the inventories you sent out?

A Yes.

Q And what type of notice did you get of their [318] receipt?

A A signed receipt by the person to whom the letter was sent.

MR. GALE: Your Honor, the Government would ask that this packet be marked Government Exhibit I.

(Government's Exhibit 1 was marked for the purpose of identification.)

Q I ask you to examine the contents of Government's Exhibit 1, and tell the Court what those green cards are.

A These are the receipts for the certified mail concerning the inventories—

MR. POLICY: If it please the Court. Your Honor, I think the exhibits will speak for themselves, and if anybody is not included amongst those cards, that can be brought up on cross-examination.

THE COURT: Very well.

Your motion is overruled, Mr. Policy.

Q Those cards are the cards you received back with [319] respect to the inventories you sent out yourself?

A That is correct.

* * * *

[339] CROSS-EXAMINATION OF
STEVEN R. OLAH

BY MR. GEARINGER:

Q Mr. Olah, I show you what has been marked for [340] identification as Government's Exhibit 1. I ask you to review that exhibit, if you would, and tell me if there is any return receipt showing notice of inventory to Mr. Lauer or Mr. Merlo.

A No, there is not.

Q To your knowledge, Mr. Olah, has either Mr. Lauer or Mr. Merlo ever been served with notice of inventory that either Mr. Merlo or Mr. Lauer's telephone conversations were intercepted?

A To the best of my knowledge, they have not.

Q And as I recall the portion of your direct testimony which refers to notice of inventory, it was to the effect that you served notice of inventory on persons who were identified as having their telephone conversations intercepted?

A Persons who, at the time the inventories were sent out, had been identified based upon information received by me.

Q Is it your understanding, Mr. Olah, that Mr. Merlo or Mr. Lauer's telephone conversations were not intercepted?

A I really do not know.

* * * *

[366] (DIRECT EXAMINATION OF
EDWIN J. GALE)

* * * *

Q I show you what is marked as Defendant's Exhibit L and ask you if you can identify that exhibit [367] and the contents therein.

A Yes, I can recognize the exhibit and the documents contained therein.

Q All right. Did you prepare those documents?

A Yes, I did.

Q Why?

A During the investigation of the instant case, it came to my attention that for some reason, which I later came to know, two of the potential defendants—

THE COURT: What is the question, please?

(The record was read by the reporter.)

THE COURT: You may proceed.

A It came to my attention that two of the potential defendants, or, in my mind, potential defendants, had not been served inventories pursuant to the statutory provisions of Title B. And therefore, so as to give them as much notice as we possibly could, we proceeded to draw up these documents and file them with Judge Battisti.

* * * *

[407] CROSS-EXAMINATION OF
EDWIN J. GALE

BY MR. JUREK:

Q With regard to Exhibit L—and I will be brief—you testified you noticed that you did not have the statutory inventories mailed to James Blank and Harvey Trifler and that you wanted them to get some notice? This was in September, I think, of 1973.

A I thought they should receive notice after examining the statute and the tenant statute.

Q And did you know of the name and address of Harvey Trifler prior to the time that you thought that he should get some notice?

A I don't know exactly when I learned that there was a Harvey Trifler.

Q How about James Blank?

[408] A I'm not sure when I learned the existence of a James Blank.

Q Well, d'd you realize that they had been arrested in January of 1973?

A No.

Q And in your application of the United States of America in Exhibit L, you contend that by administrative oversight, you neglected to notify Mr. Trifler and Mr. Blank.

Was that your administrative oversight, air?

THE COURT: Do you have any objection, counselor?

MR. CLERVI: Your Honor, just clarification.

I don't believe that the defendants were arrested at that time.

MR. JUREK: I'm sorry.

MR. CLERVI: Just for the record.

MR. JUREK: Or searched at that time.

My apologies.

Q Now, with regard to my question, in the court order, it alludes to administrative oversight. Was that your administrative oversight, Mr. Gale?

[409] A No. The administrative oversight referred to specifically in the order addresses problems existing before my arrival here in Cleveland, I believe.

Q At the date of filing of this order, you weren't in Cleveland, sir?

A When this amended order was filed, I was in Cleveland. I submitted it to the judge.

Q I see. And then you were the one that noticed that they hadn't been notified pursuant to Title 18, Section 2518?

A Oh, prior to this date, I discovered that they had been overlooked and no notice had been sent out.

MR. JUREK: Thank you. I have no further questions.

* * * *

[424] CROSS-EXAMINATION OF EDWIN J. GALE

BY MR. GEARINGER:

Q Mr. Gale, to your knowledge, did the Government ever send notice of inventory of conversations intercepted by electronics to Mr. Merlo or Mr. Lauer?

A To my knowledge, no formal inventory was received by those two individuals.

Q To your knowledge, was any informal inventory given to Mr. Lauer or Mr. Merlo say by regular [425] mail as opposed to certified mail?

A None by regular mail, no.

Q Is it not true, sir, that during the time of this case, you intend to introduce into evidence approximately 12 telephone conversations purportedly involving Mr. Merlo or Mr. Lauer that were intercepted pursuant to the court order?

A The number of conversations I could not recall at this particular time.

However, there are conversations which we would submit can be attributed to those two gentlemen.

Q And as I understand Mr. Olah's testimony yesterday, it is the Government's position that you were excused from the requirement of notice of inventory because Mr. Merlo and Mr. Lauer's identities were not known to the Government? Is that your position, sir?

A Well, there came a time that I knew of their identity, certainly.

Q And when was that, sir?

A I would imagine in late summer of 1973. Perhaps late August.

Q And was that when you initially became in charge of preparing this matter for trial or this file?

[426] A That is approximately the same time, yes, sir.

Q And who was in charge before you took charge?

A Mr. Olah was the attorney on the case.

Q Did new information arrive in your file after you took charge of this case that indicated to you that Mr.

Merlo and Mr. Lauer's telephone conversations had been intercepted?

A I don't believe that any new information came into my file.

Q In fact, is it not true, sir, that when you took over the file and reviewed the contents of the Government's file, you determined that based upon the contents of the Government file, Mr. Merlo and Mr. Lauer's conversations had been intercepted?

A At some point, I certainly reached that conclusion.

MR. GEARINGER: Would you mark this as Defendant Lauer and Merlo's Exhibit 1.

(Defendant Merlo and Lauer's Exhibit 5 was marked for the purpose of identification.)

THE COURT: Just a minute, gentlemen.

Perhaps this would be an opportune [427] time for us to take a 15-minute break. I understand the court reporter is running out of paper.

(Recess taken.)

THE COURT: Proceed, Mr. Gearinger.

BY MR. GEARINGER:

Q Mr. Gale, I show you what has been marked for identification as Defendant Lauer and Merlo Exhibit S and I ask you if you would identify it, sir.

A Yes. This is a letter that I sent to you, sir, on or about December 17, 1973.

THE COURT: What date?

THE WITNESS: December 17, sir.

Q And the letter is relatively short, Mr. Gale. Would you read the concluding paragraph of that covering letter.

A "In accordance with our telephone conversation on December 17, 1973, I do not guarantee that the transcripts are a verbatim representation of the intercepted conversation of your clients. Neither do these transcripts comprise all of the conversations involving your clients which were [428] intercepted. They do, however, comprise all monitored conversations by your clients

which have been reduced to transcript form at this time."

Q Mr. Gale, I ask you to examine the enclosure with that covering letter and ask if you can identify the enclosures.

A Well, in a general way, sir, these appear to be the enclosures which I included in my letter to you December 17, 1973 relating to copies of transcripts of conversations.

Q Would you accept my representation, Mr. Gale, that they are the enclosures that I received with that covering letter from you for the purposes of interrogation?

A Yes, sir. For the purpose of interrogation, certainly.

Q I ask you to review the enclosed transcript of what purportedly are intercepted telephone conversations involving Mr. Merlo and Mr. Lauer and determine whether or not there are, in fact, twelve separate telephone conversations that were intercepted and transcribed.

A I believe there are twelve here, sir.

Q Thank you. And on those transcribed intercepted [429] telephone conversations, is it not true, sir, that they were intercepted between December 9, 1972 and January 3, 1973?

A It is my belief that is correct.

Q And within those intercepted conversations, are there not one or more telephone conversations which were intercepted described as outgoing calls?

A The one that appears to be first says "Outgoing call."

Q And by that, is it your understanding that the telephone that was under electronic surveillance made the dial and placed the call to Mr. Merlo or Mr. Lauer?

A Yes, sir. It was a touch-tone outgoing call.

Q And if you recall Special Agent Ault's testimony yesterday, it was to the effect that on outgoing telephone conversations placed from a telephone which was under electronic surveillance, they could determine the number dialed? Do you recall that yesterday?

A His testimony was that it was possible to do that, yes, sir.

Q To your information, Mr. Gale, was the number dialed on those outgoing telephone conversations [430] traced?

A Well, sir, I think we could save some time if I responded in this manner.

Q Sure.

A With the judge's permission.

I can't answer whether or not there was a touch-tone decoding on the first conversation which says "Outgoing Call" dated 12/30/72.

However, it is within my knowledge that some telephone calls between Apartment 512, telephone numbers 777-0850, 0851 and 3850, were made to the telephone number or a telephone at an apartment at which your clients were located on January 13, 1973.

Q And that apartment was specifically 21 Olive Street, Akron, Ohio?

A It was at that address, yes, sir.

Q Pursuant to that information, was that the probable cause in requesting the search warrant on the premises at 21 Olive Street, Akron, Ohio, if you know?

A Sir, I would have to refer to the affidavit for the search warrant.

MR. GEARINGER: Is the affidavit in evidence?

[431] THE COURT: It is all a part of the Court record, yes. They have been filed. Returns have been filed with the Court.

MR. MILANO: I have one here.

THE COURT: We have it. Do you want to know which one it is?

Here it is.

MR. GEARINGER: Your Honor, would you want this marked for identification?

THE COURT: You can since you are going to use it.

(Defendant Merlo and Lauer Exhibit T was marked for the purpose of identification.)

Q Mr. Gale, showing you what has been marked for identification as Defendant's Exhibit T, which are the

affidavits filed requesting and showing probable cause for the initiation of search warrants, I direct your attention to that document, Mr. Gale, concerning what was presented as probable cause to the Court to authorize the search warrant at 21 Olive Street, Akron, Ohio.

A The probable cause section for the issuance of the search warrant in question appears to be contained [432] on Pages 41 and 42 of the affidavit sworn by Richard Ault on 12 January 1973.

Q And in that affidavit, it contains the telephone number of a telephone located at 21 Olive Street, Akron, Ohio, does it not, sir?

A Yes, it does.

Q And to your knowledge, did not agents of the FBI conduct a search of the premises at 21 Olive Street, Akron, Ohio on January 13, 1973?

A It is my belief that they did conduct such a search.

Q And is not that property presently in the possession that search, Messrs. Merlo and Lauer were present at the premises described?

A They were present, to my knowledge.

Q And to your knowledge, were they not identified on January 13, 1973 as Joseph Merlo and John Jacob Lauer?

A They were.

Q All right. During that search, was not property seized from that premises?

A I believe that is correct.

Q And is not that property preesntly in the possession of the Government?

A Yes, it is.

[433] Q And is it not true that you intend to introduce at least portions of that property seized in the trial of this matter?

A Yes, sir.

Q And is it not further true that the FBI, pursuant to their search and seizure of the premises at 21 Olive Street, Akron, Ohio on January 13, 1973, at which time Mr. Merlo and Mr. Lauer were present at said premises, filed an inventory of property seized with the Government?

A I believe an inventory was prepared by the seizing agents, if that is what you are referring to, sir.

Q Yes. Is that in the documents there that you have before you?

A Yes, sir. It appears to be a smooth inventory. It appears to be returned to Magistrate Maher on January 13.

And also a rough inventory numbering six pages apparently having the signature of Joseph Merlo there on Page 6 of 6, witnessed by apparently Special Agent William E. White, Jr. of the FBI.

Q So that on the inventory prepared by Mr. White of the FBI—dated what, sir?

[434] A The document which appears to be an inventory witnessed by Agent White bears the date January 13, 1973.

Q On January 13, 1973, therefore, is it not true that the names of Joseph Merlo and John Jacob Lauer were known by the Government?

A Well, again, you are asking me for a conclusion. They were certainly known by Agent White and Agent Herron, who made the search of that residence.

Q And as I understood the testimony, the FBI conducted these searches and seizures in accordance and coordination with the Strike Force?

A That is my understanding, yes, sir.

MR. GEARINGER: Would you mark that, please.

(Defendant Merlo and Lauer Exhibit U was marked for the purpose of identification.)

Q Mr. Gale, showing you what has been marked for identification as Defendant Lauer and Merlo Exhibit U, I ask if you can identify it.

MR. GEARINGER: For the record, your Honor, may the record show that at the lower right-hand corner of Defendant's [435] Exhibit U there is blue pen. That is mine made at a subsequent date merely as a note of a telephone conversation. I didn't have any other paper in front of me.

So I would ask the Court and the witness if they would just disregard the blue pen marking at the lower right-hand side.

A This either is the letter I sent to you on or about December 28, 1973, which has a 3-page enclosure, or an exact duplicate of the letter. I'm not sure.

Q Was that letter, to your knowledge, mailed pursuant to various motions for discovery; in particular, requests for any statements or admissions by any individual defendant in the position of the Government?

A That is correct. It was with respect to discovery orders.

Q And I ask you to review the enclosures to Defendant's Exhibit U and ask if you can identify them.

A Well, to the best of my knowledge, these appear to be the enclosures that I submitted in my letter [436] to you concerning your clients, Mr. Lauer and Mr. Merlo, and statements they made to FBI agents apparently on January 13, 1973.

Q And in reference to the enclosures concerning statements made by Mr. Lauer to the FBI agents on January 13, 1973, what, if any, admissions did Mr. Lauer purportedly make concerning the use of the telephone at 21 Olive Street, Akron, Ohio?

A I shall quote from an enclosure of the letter dated December 28 from me referring to an FBI 302 form dated 1/17/73.

"Lauer stated that he had answered the telephones that were located in Apartment 308, 21 Olive Street, and received money for his services."

Q What about Merlo?

A Specifically, I will quote from a copy of a document which I enclosed in my letter to you December 28. It is the third page of the enclosure, and it is dated January 17, 1973.

I quote, "Merlo advised that he had rented Apartment 308, 21 Olive Street, in the name of Joseph Cartelli. He stated he was operating the business at Apartment 308 and he [437] employed Jack Lauer as a phone man."

Q So Merlo, by identity, and Lauer, by identity, in conversations with FBI agents who were acting under the overall supervision, I assume, of the Strike Force, made admissions concerning the use of the telephone or telephones at the apartment where the search took place?

A That is correct. We would submit that they did.

Q And pursuant to FBI and governmental procedure, the FBI prepared a report of those interviews, did they not, sir?

A Correct.

Q And those reports were submitted to the Government's file and records in anticipation of using same in the trial of this matter in due course after the preparation, were they not?

A Correct.

Q So that by on or about January 18, 1973, you had the tapes of at least twelve telephone conversations intended to be used by the Government purportedly by and between Lauer and Merlo and one of the other defendants, you had a search of the premises having located same by identifying the telephone number by an outgoing call, you had seized property as identified in the above [438] inventory, the FBI had identified Mr. Merlo and Mr. Lauer as having been present at the premises when the search took place, and by the 17th of January, the FBI had submitted a report concerning admissions by the known Defendants Merlo and Lauer concerning this case; is that not true, sir?

A Much of what you say is not true, sir.

But for the purposes of your question, I can perhaps respond, if the Court would allow.

Q Sure.

A Not specifically addressing to whether it is true or not—

MR. GEARINGER: Excuse me, your Honor. I didn't mean to presume that I was the Court.

THE COURT: No objection.

A All of the information contained in the various reports and statements you had just referred to in your statement I would agree more likely than not were known to some element of the Federal Government.

Q Involved—

A Not by me.

Q Involved in the investigation and hopefully successful prosecution of this case; is that not [439] true, sir?

A As I have just stated, someone within the Federal Government had access to those facts you have represented.

Q In particular, the FBI?

A Some element of the FBI. That is correct.

Q And that element of the FBI was involved in investigating what ultimately resulted in the indictments and the potential trial of these defendants; is that not true?

A That is correct.

Q And they were operating under the supervision or auspices of the governmental Strike Force; is that not true, sir?

A To a degree, that is certainly true.

Q So that maybe while you personally did not have possession of these documents, they were certainly in the possession of the appropriate representatives of the Government by January 18, 1973, were they not, sir?

A I believe the information contained within the documents was known by the Federal Government by that date.

Q And in spite of all the knowledge that I have just reviewed by January 18, 1973, did any representa- [440] tive of the Government send notice of inventory through today concerning intercepted telephone conversations of Mr. Merlo or Mr. Lauer?

A As I have previously testified, to my knowledge, no formal notice has been given to your clients.

MR. GEARINGER: No further questions, your Honor.

* * * *

THE COURT: Certainly. Mr. Gearinger, while we are waiting, as I recollect, was it not you that had discussed a stipulation with the United States attorney last night?

MR. GEARINGER: Yes, your Honor.

We never agreed on a stipulation. I chose, when I determined that Mr. Gale would testify this morning, to introduce my evidence through cross-examination of Mr. Gale.

[DEFENSE EXHIBIT "T" AT SUPPRESSION HEARING]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Magistrate's Docket No. .....

Case No. .....

UNITED STATES OF AMERICA

vs.

APARTMENT 308, 21 OLIVE STREET, AKRON, OHIO

AFFIDAVIT FOR SEARCH WARRANT

BEFORE HERBERT T. MAHER, Cleveland, Ohio

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as Apartment 308, 21 Olive Street, Akron, Ohio, which is further described as: a three-story red brick apartment complex containing approximately 23 apartments and located on the north side of Olive Street. Apartment 308 occupies the southwest corner on the third floor of this complex, in the Northern District of Ohio there is now being concealed certain property, namely: bookmaking records and wagering paraphernalia consisting of, but not limited to, betting, slips, cash, bet notices and books of account which are held and used in violation of Title 18, USC, Section 1955 and 371.

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[1] The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served as any time." (Rule 41C)

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

(See attached affidavit.)

/s/ Richard L. Ault, Jr.
Signature of Affiant
S.A., FBI

Official Title, if any

Sworn to before me, and subscribed in my presence, June 12, 1973.

/s/ Herbert T. Maher
United States Magistrate

AFFIDAVIT

1. Affiant is employed as a Special Agent of the Federal Bureau of Investigation and has continuously held that position for the past three years. Affiant has been assigned to the investigation of gambling matters within the jurisdiction of the Northern District of Ohio, since February, 1972, and has had supervision of the gambling activity of ALBERT KOTOCH, JOSEPH SPAGANLO and others since September, 1972. In accordance with this assignment, affiant has received reports of investigation conducted by other Special Agents of the Federal Bureau of Investigation, and has had this information available to affiant for affiant's direction and supervision in this investigation. Included in this information have been the results of physical surveillances, information from telephone company records, and information from confidential informants who have provided reliable information on numerous occasions in the past and which information has been corroborated by subsequent investigation of Special Agents of the Federal Bureau of Investigation. Affiant adopts and incorporates the information contained herein as his affidavit. Affiant has read this affidavit and is satisfied that the information contained herein is reliable.

2. Based on the information contained herein, affiant has reason to believe and does believe that ALBERT KOTOCH, JOSEPH SPAGANLO, HARVEY TRIFLER, SANFORD GLASSMAN, LOUIS GLASSMAN, GEORGE SIDORIS, JOSEPH LYMAN, JAMES GIRARD, JAMES BLANK, VANIS RAY ROBBINS, THOMAS DONOVAN, DOMINIC BUZZACCO, JACK LORENZETTI, CHARLES MOORE, and others as yet unknown, have been and are now committing and will continue to commit offenses against the United States, that is to say: conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business which has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000.00 in any single day in violation of Title 18, United States Code, Section 1955, and a

conspiracy to violate the above in violation of Title 18, United States Code, Section 371, the laws of the State of Ohio, specifically Ohio Revised Code, Title 29, Chapter 2915, Sections 2915.01, 2915.06, 2915.09, 2915.14 (permitting a room to be used for gambling; playing a game or making a bet for money; recording wager; common gambler).

3. From my three years experience in the Federal Bureau of Investigation, including two years experience in investigation of gambling violations, and from consultation with other Special Agents of the Federal Bureau of Investigation, I know that a bookmaking business of any size requires a bookmaker to balance his books. That is, at the end of betting on a certain event, the bookmaker hopes to achieve an ideal situation of having the total amount he must pay out the same regardless of who wins. In this way the bookmaker cannot be a loser no matter what the outcome of the sport contest, for he keeps a small premium on each bet placed with him. The bookmaker then operates on a profit margin. He does not gamble on the outcome of any given event.

In order for a bookmaker to balance his books, it is almost always necessary for him to have another bookmaker with whom he can place the bets which have unbalanced his books. This second bookmaker is known as a "lay-off" bookmaker, and the above mentioned process is known as "laying off." Bookmakers will "lay off" to other bookmakers and in turn have other bookmakers "lay off" to them.

A bookmaker must also receive and furnish "line" information. This is necessary to stimulate the betting activity and to enable him to operate his business with the greatest chance of profit.

• • • •

DOMINIC BUZZACCO

JACK LORENZETTI

Interception of wire communications of the above mentioned telephones utilized by AL KOTOCH, as well as surveillances by Special Agents of the FBI, and other

investigation set forth herein, reveal that DOMINIC BUZZACCO, also referred to by AL KOTOCH as "BUZZ", and "BUZZER", is a bookmaker who accepts "lay-off" bets from AL KOTOCH.

As set forth in paragraph six above, telephone number 652-1524 is listed to T. K. PETERS, 15½ East Park Street, Niles, Ohio. Surveillances conducted by Special Agents of the FBI have shown that there is no T. K. PETERS at the above address inasmuch as no car registered to T. K. PETERS has ever appeared in the vicinity of this address, nor has investigation by Special Agents of the FBI ever revealed a T. K. PETERS who lives in this area. Further, physical surveillances by Special Agents of the FBI reveal that the automobile described further below belonging to and normally operated by DOMINIC BUZZACCO, who is known from previous investigation by Special Agents of the FBI, as a bookmaker, was observed parked in the immediate vicinity of 15½ East Park, Niles, Ohio, during the times that KOTOCH has been in contact with the above telephone number in Niles, Ohio.

a. At 5:44 p.m. on December 29, 1972, AL KOTOCH made an outgoing telephone call from telephone number 777-3850 to telephone number 652-1524. KOTOCH called the male who answered the call "BUZZ" and asked him to "run down some numbers", inasmuch as KOTOCH had a discrepancy.

A surveillance conducted by Special Agents of the FBI on December 29, 1972, at 5:10 p.m. revealed a dark green 1971 Buick, bearing 1971 Ohio license G784J, was parked in the vicinity of 15½ East Park, Niles, Ohio. A review of LEADS indicates that G784J is listed to DOMINIC BUZZACCO, 838 Moraine Drive, Youngstown, Ohio, on a 1971 Buick four-door hardtop.

b. On January 1, 1973, AL KOTOCH placed an outgoing telephone call at 2:54 p.m. to telephone number 652-1542 from telephone number 777-3850. KOTOCH and an individual he called "BUZZER," discussed a "bottom figure" of 7645.

c. At 6:11 p.m. on December 28, 1972, AL KOTOCH placed an outgoing telephone call from telephone number

777-3850 to telephone number 652-1542 and made three "lay-off" bets totaling $900.00 to the individual who answered.

d. On January 4, 1973, a physical surveillance was conducted by Special Agents of the FBI in the vicinity of 15½ East Park, Niles, Ohio. During the course of this surveillance, DOMINIC BUZZACCO and JACK LORENZETTI were observed to enter 15½ East Park.

e. During the period from December 26, 1972, through January 4, 1973, AL KOTOCH would place numerous outgoing telephone calls to telephone number 652-1542 and would, on occasion, refer to the male who answered as "JACK." The ensuing conversations with "JACK" concerned gambling activities.

f. JACK LORENZETTI entered a plea of guilty in U.S. District Court, Cleveland, Ohio, on July 25, 1971, to one count of violation of Title 18, Section 371, U.S. Code. LORENZETTI received a $1,000 fine.

Based upon the facts set forth herein, affiant has reason to believe and does believe that on the premises further described herein, and on the persons of DOMINIC BUZZACCO and JACK LORENZETTI, there is located bookmaking records and wagering paraphernalia consisting of, but not limited to, betting slips, cash, bet notices, and books of account held and used in violation of Title 18, U.S. Code, Section 1955 and 371. The premises located at 15½ East Park, Niles, Ohio, is further described as a two-story red brick building located on the south side of Park Street. The building houses an empty store on the downstairs level which has a large plate-glass window in front facing Park and an entry door to 15½ which leads to the second level, which is 15½ East Park and which is where the telephone is located. This second story is accessible only by the stairway from the entry way which is located on the east side of the building facing the building.

* * * *

VANIS RAY ROBBINS

16. Interception of wire communications of the above-mentioned telephones, as well as surveillances by Special

Agents of the FBI, and other investigation set forth herein, reveals that VANIS RAY ROBBINS, is a bookmaker who "lays off" to and receives "lay-off" bets from AL KOTOCH.

Pretext telephone calls to telephone number (513) 242-6664 by Special Agents of the FBI, Cincinnati, Ohio, Office on December 27, 28, 29, 30, 1972, and January 1, 1973, placed ROBBINS at that address during the hours that KOTOCH was operating his bookmaking office, which was from approximately 5:00 p.m., to 7:30 p.m., during the week and from 11:00 a.m., to 7:30 p.m., on the weekend, and on January 1, 1973.

a. On January 3, 1973, at 7:36 p.m., an individual previously identified as HARVEY TRIFLER placed an outgoing call on telephone number 777-0851 to an individual identified by affiant as AL KOTOCH at telephone number 221-5092. TRIFLER then asked KOTOCH for "82's" telephone number. KOTOCH gave the following telephone number: 1-513-242-6664. TRIFLER then placed an outgoing telephone call to the above telephone number and talked to "82." During the course of the conversation, "82" and TRIFLER could not agree upon their "bottom" figure, that is, the amount which one owes the other. "82" then asked TRIFLER which teams KOTOCH had bet into him, "82." The two parties then discussed at length their bets with one another. TRIFLER then called KOTOCH again at 7:45 p.m., from telephone number 777-3850 at telephone number 221-5092, and KOTOCH tells TRIFLER to look for "82's" figures on KOTOCH's "beard sheet," that is, a sheet containing names or code names of individuals who act as agents for the bookmaker.

Telephone number (513) 242-6664 is listed to CECIL B. RIDGEWAY, Apartment 26, Turf Hotel, 322 Locust Street, Elmwood Place, Ohio, and telephone number (513) 242-9918 is listed to Locust Poolroom, 320 Locust Street, Elmwood Place, Ohio. Investigation by Special Agents of the FBI reveals that VANIS RAY ROBBINS is currently under indictment in Cincinnati, Ohio, by United States Federal Grand Jury for violation of Federal Gambling laws; Title 18, U. S. Code, Sections 1084,

1952, and 371. This case is currently pending in the U. S. District Court for the Southern District of Ohio.

b. On December 2, 1972, at 3:45 p.m., AL KOTOCH received an incoming telephone call on telephone number 777-0850, from an individual identified by KOTOCH as "99". The following conversation ensued:

Incoming call
3:45 pm
12/2/72
777-0850
Reel 6

99	What about my . . . This horse guy . . .
AL	I think he's having problems with his guy.
99	Huh
AL	I think he's having problems with his guy . . . he isn't gettin' him.
99	What about the guy I can maybe move into . . .
AL	(Hesitates)
99	Remember, I asked to . . . I gotta have an out.
AL	How much out do you need?
99	Well . . .
AL	Why do you need an out. Are ya gettin' hit with plenty of . . .
99	I do a lot of business. I don't (obscene) around. You don't think we sit here for nothing do you?
AL	Hold on. (In background, "Hello")
99	It's as simple as that and I get a lot of stuff but I do not book heavy on horses. I book maybe half, to a buck . . .
AL	Well, what kinda out do you need, you see, I don't want to give ya my out down there if ya are gonna spoil it for me.
99	You mean for pieces?
AL	Yeah.
99	I might get some pieces like I give ya.
AL	No, if I get my steamers and you might get them before me and . . .
99	How can I get them before you?

AL Who the (obscene) knows
99 Not from that . . . We never did before.
AL (mumbles)
99 Just tell the guy . . .
AL Hold on.
99 The guy's gonna make money. I'll tell ya right now. Here's the thing . . .
AL I'm calling the guy right now, relax . . . (Background on phone not monitored, "hello, RAY . . . I gotta horse man, B.M., needs a horse out . . . I don't know . . .")
Is it legit stuff, 99?
99 Yeah, he can call it what he wants but we beat it every week.
AL (on other phone, "he says he beats it every week. The only thing . . .")
What kinda figures you want to give . . . What kind of horses you want to lay into, amounts . . . amounts . . .
99 Bucks, deuces, maybe more, maybe less
AL (To RAY on other phone, "All right, now you should come in as "99" . ... let him come in as "99" . . . I'll give him your phone number, O.K. Right . . .")
Now I'll tell you right now if you ruin my out I'll . . .
99 I won't
AL Wait a second let me finish! I want you to know what front if you ruin my out . . . This is my big out . . . you understand, this for my steamers, because you take bucks, this guy takes three's and four's off a me . . . if you ruin it for me I'm gonna tell him to cut ya off.
99 All right!
AL Is that fair enough?
99 Sure.
AL All right hold on. All right"
99 Yeah
AL Now this guy's down in Cincinnati
99 Yeah . . .

AL You go in as "99" . . .
99 All right
AL 1-513/242-6664
99 What's his hours?
AL You can call him right now, the other number is 9918.
99 Same exchange?
AL Yeah.
99 242?
AL Yeah
99 OK, I make my own arrangements.
AL Yeah
99 OK I'll call right now. Bye.

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c. During the course of interception of the telephone utilized by AL KOTOCH, VANIS ROBBINS has called to KOTOCH on an almost daily basis and placed large wagers with KOTOCH. When the caller would identify himself, it would be by the number "82'.

• • • •

THOMAS DONOVAN

17. Interception of wire communications of the above mentioned telephones of AL KOTOCH, as well as physical surveillances by Special Agents of the Cincinnati Division of the FBI, and other investigation as set forth herein reveal that THOMAS DONOVAN is a bookmaker who lays off to AL KOTOCH.

Physical surveillances of DONOVAN's residence, 4669 Hilton, by Special Agents of the Cincinnati Division of the FBI on December 27, 1972, placed DONOVAN in his apartment, 4669 Hilton Avenue, Apartment D, Columbus, Ohio, between 5:20 p.m., and 8:00 p.m.; on December 28, 1972, between 5:00 p.m., and 8:00 p.m.; and on December 29, 1972, between 11:00 a.m., and 4:00 p.m.

a. During the course of interception of communications of KOTOCH's telephones, an individual who at times identifies himself as "CAL" calls KOTOCH on an almost daily basis, receives the line information, then calls

back with large wagers. "CAL" has a distinctive voice which affiant had identified during the course of monitoring on several occasions, when "CAL" did not identify himself.

b. On December 8, 1972, AL KOTOCH, received an incoming telephone call on telephone number 777-0850 at 5:19 p.m. from an individual who identified himself as "CAL," and who affiant identified by his voice as identical to the "CAL" who called KOTOCH on a daily basis. During the course of the conversation, "CAL" advised that he had lost "eighty eight dollars" the previous day. "CAL" then places a large amount in bets with KOTOCH. KOTOCH then asked "CAL" if he, KOTOCH, could mail him a cashier's check to pay part of the amount KOTOCH owed "CAL." "CAL" agreed and gave his name as THOMAS DONOVAN and his address as 4669 Hilton Avenue, Apartment D, Columbus, Ohio, Zip Code 43228.

c. On December 12, 1972, at 6:04 p.m. HARVEY TRIFLER answered an incoming telephone call on telephone number 777-0850 and the individual who was calling identified himself as "CAL," and who affiant identified by his voice as THOMAS DONOVAN. DONOVAN was placed on "hold" by TRIFLER and while on hold, DONOVAN was heard discussing "line" information with an individual in the background, or on another telephone, he called "LOUIE." During this discussion in the background, DONOVAN was heard accepting a bet from another individual in the background, or on another telephone.

d. During the hours in which Special Agents of the Cincinnati Division of the FBI were conducting a physical surveillance on DONOVAN's residence, from December 26, 1972, through January 1, 1973, an individual who identified himself as "CAL" called KOTOCH for "line" information.

e. Physical surveillances set forth above also show that DONOVAN utilizes his automobile, a 1972 Buick four-door sedan with Ohio license H5567, to leave his apartment during the day and that DONOVAN apparently conducts his business, during the time he is not placed in his apartment, from his automobile.

f. Source Four has been a reliable source of the Cincinatti Division of the FBI in excess of two years and has provided information on at least three occasions in the past which has led to the arrest of fourteen bookmakers at Columbus, Ohio. Source Four is aware of the activities of THOMAS DONOVAN through personal acquaintance with DONOVAN and through conversations with bookmakers who deal with DONOVAN. Source Four advised a Special Agent of the FBI, who in turn related to affiant, that as recently as the week ending January 7, 1973, Source Four has personally observed DONOVAN utilizing his automobile during the course of his bookmaking operation to pick up and pay off wagers.

* * * *

Apartment 308
21 Olive Street,
Akron, Ohio

Interception of wire communications of the above mentioned telephones of AL KOTOCH, as well as physical surveillances by Special Agents of the Federal Bureau of Investigation and other investigation as set forth herein, reveals that one or more unknown individuals located at Apartment 308, 21 Olive Street, Akron, Ohio, are bookmakers who accept and place "lay off" wagers with AL KOTOCH.

a. On January 1, 1973, AL KOTOCH placed an outgoing telephone call from telephone number 777-3850 to telephone number 1-535-2133. KOTCH "layed off" a bet with the male who answered for $500.00 and the individual to whom KOTOCH was speaking in turn "layed off" a bet to KOTOCH for $500.00.

b. During the course of monitoring KOTOCH's telephones from December 26, 1972, to January 4, 1973, KOTOCH has placed numerous telephone calls to telephone number 535-2133 and has received line information from the individual who answers or has accepted or "layed off" wagers to the individual who answered the telephone.

c. Records of the Ohio Bell Telephone Company, Akron, Ohio, were reviewed by Special Agents of the Fed-

eral Bureau of Investigation in December, 1972, and again on January 10, 1973, and reflect that telephone number 535-2133 is listed to JOSEPH CARTELLI at Apartment 308, Olive Street, Akron, Ohio. Investigations by Special Agents of the Federal Bureau of Investigation, such as credit check and check of the records of the local police departments, as well as a review of Law Enforcement Automated Data Systems (LEADS), indicates that the name JOSEPH CARTELLI at that address is fictitious.

d. Physical surveillances were conducted by Special Agents of the Federal Bureau of Investigation at 21 Olive Street on January 3, 1973, and January 4, 1973, and it was determined that Apartment 308 appears to be occupied only from about 11:30 a.m. to around 7:00 p.m. during each day. Special Agents of the FBI determined that once the light was extinguished in Apartment 308 that no one appeared to occupy the apartment. This determination was made by utilizing a pretext telephone call to telephone number 535-2133.

Based upon the facts set forth above, affiant now has reason to believe and does believe that on the premises more fully described hereafter, there is located bookmaking records and wagering paraphernalia consisting of, but not limited to, betting slips, cash, bet notices, and books of account, held in violation of Title 18, United States Code, Sections 1955 and 371. The premises located at 21 Olive Street is described as a three-story red brick apartment complex containing approximately 23 apartments and located on the north side of Olive Street. Apartment 308 occupies the southwest corner on the third floor of this complex.

Further, affiant sayeth not—

/s/ Richard L. Ault, Jr.
RICHARD L. AULT, JR.
Special Agent
Federal Bureau of Investigation

Subject is sworn to before me this 12th day of Jan., 1973

/s/ Herbert T. Maher
U.S. Magistrate

SUPREME COURT OF THE UNITED STATES

No. 75-212

UNITED STATES, PETITIONER

v.

THOMAS W. DONOVAN, ET AL.

ORDER ALLOWING CERTIORARI. Filed February 23, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 203719 231

IN THE

Supreme Court of the United States

No. 75-212

October Term, 1975

UNITED STATES OF AMERICA,
Petitioner

v.

THOMAS W. DONOVAN,
Et Al.

Memorandum In Opposition To Government's Petition For A Writ of Certiorari On Behalf of Dominic Ralph Buzzacco

Carmen A. Policy,
Attorney for Defendant,
Dominic Ralph Buzzacco,
411 Legal Arts Centre,
P. O. Box 837,
Youngstown, Ohio 44501,
Telephone No. (216) 746-3217.

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October Term, 1975

UNITED STATES OF AMERICA,
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v.

THOMAS W. DONOVAN,
Et Al.

MEMORANDUM IN OPPOSITION TO GOVERNMENT'S PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF DOMINIC RALPH BUZZACCO

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone Intercept Application of a person, whom the Government knows or has probable cause to believe, is involved in the specified illegal activity and can be expected to be overheard in said interception.

2. Whether, the Government violated the Wiretap Interception Statute as indicated in No. 1 above, suppression of the evidence derived from the intercept is justified.

COUNTER STATEMENT OF FACTS

The Defendant, Dominic Ralph Buzzacco, accepts most of the Government's Statement of Facts as contained in their Petition For a Writ of Certiorari, but contends that The District Court did not rely on dictum in *United States* v. *Kahn,* 415 U.S. 155, No. 72-1328, decided February 20, 1974, slip opinion Page 9, 94 S. Ct. 977, 982. It, in fact, relied upon the actual holding and body of the decision. This Defendant also contends that it was perfectly clear as a result of the Evidentiary Hearing in The District Court below that the Government knew, or should have known, of the existence of Dominic Ralph Buzzacco, his involvement in the suspected bookmaking operations and the fact that his conversations would have been intercepted in connection with the applied and Intercept Order.

REASONS FOR DENYING THE WRIT

The United States Court of Appeals For The Sixth Circuit first approached the questions presented in this case by reviewing the obligations of the Government as dictated by Title III, 18 U.S.C., Section 2518 relating to the necessity of identifying various individuals and applications for intercept authority when the Government had probable cause of suspecting that said individuals would be intercepted in connection with the violation of the relevant crime being investigated. After establishing a Statutory violation for failure to list said individuals in the proper applications, the Court then considered whether suppression of any evidence obtained in connection with said interception was the proper remedy in connection with that particular issue. The Sixth Circuit ruled unanimously that a violation did occur and suppression was the proper remedy.

This Honorable Court has given proper guidance and has established clear precedent in connection with both

of these issues in its decisions in *United States* v. *Kahn,* 415 U.S. 155, No. 72-1328, decided February 20, 1974, slip opinion Page 9, 94 S. Ct. 977, 982 and *United States* v. *Giordano,* 416 U.S. 505, No. 72-1057, decided May 13, 1974, slip opinion, Page 21, 94 S. Ct. 1820. The *Kahn* decision refused to burden the Government with the unnecessary duty of conducting a full scale exhaustive investigation of all individuals who may possibly be intercepted in the course of a wiretapping prior to the Government applying for said wiretap. However, the factual situation in *Kahn* is entirely different from the situation that is presently before this Honorable Court. The District Court below, after a lengthy Evidentiary Hearing, ruled that the Government knew of Dominic Buzzacco's identity and general activities relating to any gambling and bookmaking activities prior to its applying for the relevant Application to Intercept Communications which was made on December 26, 1972. Whereas, even though The Supreme Court ruled that Mrs. Minnie Kahn was not a party required to be named in the particular application involved in that case, it stated very clearly that: —

> ". . . Title III requires the naming of a person in the Application or Interception Order only when the law enforcement authorities have probable cause to believe that the individual is committing the offense for which the wiretap is sought."

The *Giordano* decision addressed itself to the issue of the proper remedy for a Statutory violation such as was the subject matter of the *Kahn* case, and the case which is presently before the Court, relating to identity. The Supreme Court stated very clearly in *Giordano,* supra that Statutory violations of Title III would result in the suppression of evidence, and suppressing of any evidence obtained as a result of the intercept:

> ". . . But it does not necessarily follow, and we cannot believe, that no statutory infringements whatsoever

> are also unlawful interceptions within the meaning of Paragraph (i). The words 'unlawfully intercepted' are themselves not limited to constitutional violations, and we think Congress intended to require suppression whether as failure to satisfy any of these statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."

When the *Kahn*, supra, case is read in conjunction with *Giordano*, it becomes apparent that the Supreme Court has imposed upon the Government the obligation of strict Statutory compliance when dealing with Title III interceptions. Furthermore, the Court declared that "suppression of evidence" would result when the Government failed to meet this obligation. The *Kahn* decision clearly states that if the Government had foreknowledge of Minnie Kahn's identity and probable cause to believe she was engaged in gambling operations, then she should have been listed in the application for the wiretap. A failure to identify her under those circumstances would have resulted in suppression of evidence obtained as a result of the interceptions.

The Government cannot look to The Supreme Court's ruling in the *United States* v. *Chavez, Et Al*, 416 U.S. 562, No. 72-1319, decided May 13, 1974, 94 S. Ct. 1849, for support of its proposition that a Statutory violation of Title III will not result in suppression of any evidence obtained in connection with the interceptions. In *United States* v. *Chavez, Et Al*, supra, the Court dealt with a simple ministerial mistake which, in effect, did not constitute the same direct substantive violation of Title III as is involved in this appeal. The Court's logic indicated that the suggested violation did not fit under any of the categories of 18 U.S.C., Section 2518 (10)(a) and therefore any evidence obtained in connection with said wire interceptions would

not be suppressed. The Court stated in *Chavez, Et Al*, supra, that:

> "*Giordano* holds that Paragraph (i) does include any single 'failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of these extraordinary investigative devices'."

The Government's failure to include Dominic Buzzacco in its application of December 26, 1972 was a direct violation of Title III and would be included in Section 18 U.S.C. 2518 (10)(a) as grounds for suppression of evidence obtained as a result of any communications intercepted. This was more than the mere misidentification of an officer authorizing the wiretap application as was the case in *United States* v. *Chavez, Et Al*, supra. It is interesting to note that the decision in the *United States* v. *Chavez, Et Al*, supra, case was split five-four with four of the justices dissenting on the grounds that they felt that even the technical misidentification of the officer who authorized the wiretap should result in the suppression of any evidence obtained as a result thereof.

The suggestion of the Government in its Supplemental Memorandum to the effect that there is now a split in decisions from the Fifth Circuit as opposed to the decisions of the Fourth and Sixth Circuits, does not merit the fact that a true conflict exists. The matter of *United States* v. *Doolittle, Et Al*, 507 F. 2d 1368, rehearing granted April 7, 1975, argued June 3, 1975 (contained in Supplemental Memorandum For The United States, Appendix B) suggests that some prejudice must be shown before suppression would be permitted in a situation where the identity of an individual was not included in an Application For an Intercept Order. The Fifth Circuit Court of Appeals, in its Opinion (Page 17a, Paragraph No. 7, Supplemental

Memorandum For The United States of America), stated that "The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity *only* [emphasis added] of Doolittle as the co-owner of The Sportsmen's Club, the establishment wherein the telephones were located and to which the telephone bills were sent". There appears to be a distinct and significant factual differentiation between *Doolittle* and the Defendant, Dominic Buzzacco, matter. This Court has established perfectly clear guidelines in connection with these issues which have been followed without hesitation by two Circuits to date.

CONCLUSION

For the foregoing reasons the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

CARMEN A. POLICY,
Attorney for Defendant,
Dominic Ralph Buzzacco,
411 Legal Arts Centre,
P. O. Box 837,
Youngstown, Ohio 44501,
Telephone No. (216) 746-3217.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-212

UNITED STATES OF AMERICA,
Petitioner

- vs -

THOMAS W. DONOVAN, *et al.*,
Respondents

Brief of Respondents Merlo and Lauer in Opposition to Petition For A Writ of Certiorari

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Bernard A. Berkman
Joshua J. Kancelbaum
Berkman, Gordon & Kancelbaum
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
781-5245
Attorneys for Respondents
Joseph F. Merlo and
Jacob J. Lauer

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In the Supreme Court of the United States

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No. 75-212

UNITED STATES OF AMERICA,
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THOMAS W. DONOVAN, *et al.*,
Respondents

BRIEF OF RESPONDENTS MERLO AND LAUER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the government has the duty to exercise care in furnishing to the District Court the identity of persons unnamed in a wiretap order whose conversations have been overheard in the course of interception and against whom the government intends to obtain indictments, so that the court may exercise its statutory discretion under 18 U.S.C. § 2518 (8)(d) to serve persons not named in the interception order with the inventory notice.

2. Whether suppression of a wire interception is justified where through advertence or gross negligence the government failed to supply the District Court with the names of individuals whose conversations were secretly intercepted, so that the District Court was misled into omitting them from its inventory order, and where the

persons whose conversations were intercepted had neither actual notice nor statutory notice of the interceptions and did not learn of the interceptions except in response to their post-indictment discovery motions more than a year after the interceptions occurred.

STATUTORY PROVISIONS INVOLVED

The relevant portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) are set forth in Appendix E of the Petition for Certiorari at pp. 59a - 63a.[1]

COUNTERSTATEMENT OF FACTS

History

Respondents Merlo and Lauer were indicted on November 1, 1973, together with a number of other persons, on charges of conspiracy to operate and operation of a gambling business in violation of 18 U.S.C. §§ 371 and 1955. On November 30, 1973, a motion for discovery was filed on behalf of Merlo, pursuant to which respondents learned that the government intended to introduce about twelve telephone conversations which had been intercepted by wiretap between December 9, 1972 and January 3, 1973. These respondents filed a motion to suppress on December 12, 1973, arguing *inter alia,* that they had never received notice of the interception in accordance with 18 U.S.C. § 2518 (8)(d). This contention was sustained by the District Court, which granted the Motion to Suppress on this issue on January 17, 1974.

The government appealed the decision to the United States Court of Appeals for the Sixth Circuit which affirmed the District Court's decision on March 17, 1975.

[1]The opinion and orders below are also appended to the Petition for Certiorari. App. A-D, pp. la-58a. The opinion of the United States Court of Appeals for the Sixth Circuit is published at 513 F.2d 337 (6th Cir. 1975).

On August 8, 1975, the government filed its petition for certiorari herein and pursuant to motion, this Court extended respondents' time for filing an opposing brief to October 9, 1975.

Circumstances Surrounding the Wire Interceptions

The wiretaps in question were made pursuant to an order entered by a District Judge on November 28, 1972, authorizing interception of communications of six named individuals "and others, as yet unknown" to and from four designated telephones for fifteen days (C.A. App. 66-69).[2] On December 26, 1972, additional orders were entered modifying the November 28 order and extending it for an additional fifteen days, and enlarging the surveillance to include an additional named individual and an additional telephone (C.A. App. 103-110). Respondents Merlo and Lauer were not named in either the November 28 or the December 26 orders.

On February 21, 1973, a District Judge ordered the government to serve an inventory notice upon thirty-seven persons whose communications had been intercepted (C.A. App. 118-120), including many persons who had not been named in the interception order. The names of the persons upon whom the judge directed service of notice had been furnished to the court by an attorney with the Justice Department, who in turn had received the names from an F.B.I. agent (C.A. App. 197). Merlo and Lauer were not among those named in the inventory order and were not served with notice (Petition for Certiorari, p. 4).

The list of persons to be served was prepared by the government on the basis that all persons "positively identi-

[2]Citations to the record below are designated by reference to the appropriate page of the Court of Appeals Appendix, abbreviated "C.A. App." Citations to the opinions below are designated by the pages of the Appendix to the Petition for a Writ of Certiorari (abbreviated "P.C. App.") where they appear.

fied" were to be served with notice (C. A. App. 197). However, on September 11, 1973, the government filed a motion for an amended inventory order, representing in substance, that two persons, named Harvey Trifler and James Blank, had not been included in the inventory order and had not been served with notice by reason of "administrative oversight" (C.A. App. 129-131). The motion was granted (*Id.* at 134-135). Merlo and Lauer were not named in the motion for an amended inventory order and did not receive notice pursuant to the amended order (Petition for Certiorari, p. 4).

Merlo and Lauer were well-known to the government and were positively identified suspects in the investigation by not later than January 1973. By that time, their telephone communications had been intercepted as described above; they had been personally interviewed by F.B.I. agents who had obtained admissions from them (C.A. App. 219-220); and they had been identified as present during a search of the premises pursuant to warrant on January 13, 1973 (C.A. App. 215).

In his consideration of the motions to suppress filed on behalf of defendants Merlo and Lauer, District Judge Robert B. Krupansky found that "defendants Merlo and Lauer were not served with inventories pursuant to the Act or otherwise notified that they had been intercepted" (P.C. App. 54a), and that "in the interests of justice their communications must be suppressed" (*ibid.*).

Government's Factual Contentions Not Supported By The Record.

Two aspects of the petitioners' recitation of the facts merit special refutation.[3] First, petitioners assert that the omission of notice to Merlo and Lauer was an "inadvertent administrative error" (Petition for Certiorari, p. 18), and

[3] These respondents do not concede that the statement of facts in the Petition for Certiorari is otherwise necessarily correct.

that "[a]pparently, the names of Merlo and Lauer were not transmitted to the judge because of a failure of communication between the F.B.I. and the prosecutor (App. A, *infra*, p. 15a)." There is no testimony to support this assertion. While the government asserted "administrative oversight" as the reason for seeking an amended order naming Trifler and Blank (C.A. App. 129-131), there is no record on the reason for the further omissions of Merlo and Lauer from the motion for an amended order at a time when these respondents had been positively identified. The petitioner's record citation (App. A. P. 15a) in support of this assertion is merely a reference to the same self-serving contention as recited, but not approved, in the opinion of the Court of Appeals below. In view of the failure of the government to include these respondents after its representatives had noted the omissions of Trifler and Blank and presumably checked the records with some care, the assertion that the failure is mere inadvertence is excessively self-forgiving on the part of the government. If not deliberate, this second omission of names from a purportedly complete list was a grossly negligent misrepresentation to the District Court.

Second, the government urges that these respondents had "actual notice" of the wiretap. This assertion is barred by the finding of the District Judge that they had not been "otherwise notified" (P.C. App. 54a), and the Court of Appeals below so held (P.C. App. 15a).[4]

[4] The Court below also refused to infer knowledge from the fact that 39 others received notice.

"Others may have communicated the fact of interception to Merlo and Lauer, but this would not necessarily lead them to believe that they had been intercepted. It is just as reasonable to assume that Merlo and Lauer would believe that, since they had not received notice, their conversations were not intercepted." P.C. App. 15a.

The Court below found that

"[t]he only evidence of notice in the record is in response to Merlo's and Lauer's motions for discovery, filed after their indictments and more than a year after the actual interceptions. If these defendants had never been indicted, they might well have never received notice of the interceptions." (P.C. App. 15a).

ARGUMENT: REASONS FOR DENYING THE WRIT

1. This case does not present for review the question of the scope of the government's duty to advise the court of the identity of persons whose conversations have been overheard for purposes of the court's exercise of discretionary authority to serve them with notice under 18 U.S.C. 2518 (8)(d).

While the government asserts that this case presents the question "[w]hether the government has the duty under 18 U.S.C. 2518 (8)(d) to advise the court of the identity of every person whose conversations have been overheard"[5] it simply does not.

Title III is silent on the duty of the government to inform the court of the identity of persons overheard. It merely provides, in pertinent part, that

> "Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, *and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice*, an inventory which shall include notice of –
>
> (1) the fact of the entry of the order or the application;

[5]Petition for Certiorari, p. 2.

> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
>
> (3) the fact that during the period wire or oral communications were or were not intercepted . . ." 18 U.S.C. 2518 (8)(d) (Emphasis added).

It is obvious, as the court below noted, that

> "The judge has no independent information as to the unnamed parties who have been overheard on the intercepts and must depend on the Government to disclose that information in order that he may exercise his discretion. (P. C. App. 14a)."

However, the court below did not rule that the government must furnish "all" names of persons overheard, it merely recited approval of the much less onerous standard adopted in the Ninth Circuit in *United States v. Chun*, 503 F. 2d 533 (9th Cir. 1974):

> "[A]lthough the judicial officer has the duty to cause the filing of the inventory, it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his § 2518 (8)(d) discretion, we also hold that the government is required to furnish such information as is available to it. *Id.*, at 540 (footnote omitted), quoted below at P. C. App. 14a.

Even the validity of the lesser and eminently reasonable standard adopted in *Chun, supra,* is not presented by this appeal. There is no indication that the District Judge below imposed *any* standard upon the government. The government concedes that

> "[i]t is the current practice of the Department of Justice to provide the supervising judge with the name

> of every person who has been overheard if there is judged to be any reasonable possibility that the person will be indicted." Petition for Certiorari, p. 12, fn. 10.

And the government attorney testified that *he* made the determination to include persons in the inventory if they were "positively identified." (C.A. App. 197).

By the standards employed by the government, Merlo and Lauer should have received notice. It was the unmistakably implied representation of the government to the District Judge that all names of positively identified persons to be indicted had been included in the list, and the judge's disposition of this matter demonstrates that he would have exercised his discretion to give these respondents notice if he had not been prevented from so doing by the government's deliberate or negligent withholding of their names.

Even the adoption of a less onerous standard could not have affected the outcome of this case. Whatever policy for informing the District Judge may ultimately be approved by the federal judiciary, that policy is not likely to forgive the government of all responsibility for meeting it with care, or to require informing the judge of all persons overheard except those whom the government negligently forgets or deliberately ignores. No conflict has yet arisen among the lower federal courts in the delineation of the extent to which the government must endeavor to inform the court of the identity of unnamed persons overheard. This case does not present that issue, and involves only a failure to carry out the plan of disclosure which the government represented it was observing and upon which the court necessarily relied in framing its inventory order. Therefore, this case is not an appropriate vehicle for reviewing the government's duty to identify to the judge unnamed persons whose conversations have been overheard.

2. Supreme Court Review Of Suppression As A Remedy For Prosecution Induced Failure To Serve The Inventory Notice In Accordance With 18 U.S.C. ∫ 2518(8)(d) Is Unnecessary.

(a) The courts below correctly decided that suppression is justified for violation of the inventory notice requirements of 18 U.S.C. ∫ 2518(8)(d).

Prior decisions of this Court and the legislative history of Title III compel conclusion that the inventory notice provisions of 18 U.S.C. § 2518(8)(d) were mandated by the Fourth Amendment, and were regarded by Congress as fundamental to the constitutional validity of the Act.

In *Berger v New York,* 388 U.S. 41 (1967), this Court applied the Fourth Amendment's prohibition of unreasonable searches and seizures to wiretaps and electronic eavesdropping, and invalidated New York's eavesdropping law for failure to meet Fourth Amendment criteria. One of the specific fatal defects noted in *Berger* was that:

> ". . . the statute's procedure, necessarily because its success depends on secrecy, *has no requirement for notice as do conventional warrants,* nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits uncontested entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. *Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties.* In short,, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." (Emphasis added) *Id.* at 60.

A few months later this Court struck down a federal warrantless search, in part, because the searching officers were not

> "directed, after the seaching had been completed, to notify the authorizing magistrate *in detail of all that had been seized.*" *Katz v. United States,* 389 U.S. 347, 356 (1967). (Emphasis added).

The framers of the Omnibus Crime Control and Safe Streets Act expressly reported that

> "[w]orking from the hypothesis that any wiretapping and electronic surveillance legislation should include the . . . constitutional standards [of *Berger* and *Katz*], the sub-committee has used the *Berger* and *Katz* decisions as a guide in drafting Title III." Senate Report (Judiciary Committee), No. 1097, 2 U.S. Code Congressional and Administrative News 1968, p. 2163.

The requirement "to notify the authorizing magistrate, after the search, of all that had been seized" found lacking in *Katz,* was one of the constitutional standards specifically noted by the sub-committee. *Id.* at 2162. Accordingly, the portion of the section-by-section analysis, contained in the Senate Report 1097, on subparagraph (d) of paragraph (8), describes the purposes of the inventory notice in mandatory and constitutional terms:

> "Subparagraph (d) places on the judge the duty of causing an inventory to be served by the law enforcement agency on the person named in an order authorizing or approving an interception. This reflects existing search warrant practice. See Federal Rules of Criminal Procedures, 41(c); *Berger v. New York,* 87 S.Ct. 1873, 388 U.S., 41 (1967); *Katz v. United States,* 88 S.Ct. 507, 389 U.S. 347 (1967). The inventory must be filed within a reasonable period of time, but not later than 90 days after the interception is terminated. It must include notice of the entry of the order, the date of its entry, the period of authorized or approved interception, and whether or not wire or

oral communications were intercepted. On an ex parte showing of good cause, *the serving of the inventory may be, not dispensed with, but postponed.* For example, where interception is discontinued at one location, when the subject moves, but is reestablished at the subject's new location, or the investigation itself is still in progress, even though interception is terminated at any one place, the inventory due at the first location could be postponed until the investigation is complete. In other situations, where the interception relates, for example, to a matter involving or touching on the national security interest, it might be expected that the period of postponement could be extended almost indefinitely. Yet the intent of the provision is that the principle of postuse notice will be retained. *This provision alone should insure the community that the techniques are reasonably employed.* Through its operation all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress for example, under section 2520, discussed below, if he feels that his privacy has been unlawfully invaded." *Id.* at 2194. (Emphasis added).

This clear manifestation of congressional intent echoes earlier conclusions of the President's Commission on Law Enforcement and Administration of Justice, the recommendations of which sparked the enactment of Title III. After discussing the particular perniciousness of the surreptitious character of electronic surveillance, and the general Fourth Amendment requirement that "all searches must be on notice," the Commission concluded

> "There is no reason why some sort of inventory procedure applicable to electronic surveillance warrants could not be worked out. Warrant procedures prior to use of electronic equipment and *inventory procedures subsequent to its use would help limit the indiscriminate use of the devices.* More importantly, they would make possible prior and subsequent judicial review of their use and possible abuse." *The President's Commission on Law Enforcement and Ad-*

ministration of Justice, Task Force Report: Organized *Crime,* 80, 97, 103 (1967) (Emphasis added).

The foregoing analysis compels conclusion that the inventory notice provisions of Section 2518(8)(d) are both rooted in Fourth Amendment requirements and intended by Congress as a mandatory element of the legislative scheme to limit indiscriminate use of interception procedures. Given the constitutional dimension of a violation of Section 2518(8)(d), suppression of the communications obtained without compliance with that section is justified on authority of *Weeks v. United States,* 232 U.S. 383 (1914) and *Mapp v. Ohio,* 367 U.S. 643 (1961).

As an important part of the congressional scheme to assure reasonable use of wiretapping and electronic surveillance, the inventory notice requirements are enforceable by suppression in keeping with the guidelines enunciated by this Court in *United States v. Giordano,* 416 U.S. 505 (1974); *United States v. Chavez,* 416 U.S. 562 (1974) and *United States v. Kahn,* 415 U.S. 143 (1974).

Section 2518(10)(a) of Title III provides for suppression of an intercepted communication on the following grounds:

> "(i) the communication was unlawfully intercepted;
>
> "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> "(iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. § 2518(10)(a).

In *United States v. Giordano, supra,* this Court held that the words "unlawfully intercepted" in subsection (i) quoted above were "not limited to constitutional violations" 416 U.S. at 527, and that

> "Congress intended to require suppression where there is failure to satisfy *any* of those statutory requirements

> that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id.,* at 527. (Emphasis added)

The legislative history mentioned above demonstrates that the inventory notice provisions occupied a "central role in the statutory scheme",[6] and directly and substantially implement the intention to limit the indiscriminate use of interception, justifying enforcement by suppression. Three circuit courts of appeal have so held.

In *United States v. Eastman,* 465 F. 2d 1057 (3d Cir. 1972) the court held that a judge cannot waive the inventory provisions. The court ordered suppression on alternate grounds. First, the court ruled that the interception was not "in accordance with the provisions of this chapter [Title III]" and thus could not be disclosed under the authorization of 18 U.S.C. § 2517(3). *Id.,* at 1062. Second, the court found that the communications were "unlawfully intercepted" and therefore subject to statutory suppression under Section 2518(10)(a)(i); and finally it held that the inventory requirements implement the Fourth Amendment as interpreted by *Berger v. New York, supra,* requiring exclusion of evidence secured in violation of their wording. *Id.,* at 1063.

While the Court of Appeals for the Ninth Circuit remanded the ultimate question of suppression to the District Court in *United States v. Chun,* 503 F. 2d 533 (9th Cir. 1974), it noted the constitutional foundation of the inventory notice (*id.* at 536-538), and further held that "the inventory notice provision is a central or at least a functional safeguard in the statutory scheme." *Id.* at 542.

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[6] *Id.,* at 528.

Finally, and most recently, the court below, in reliance upon this Court's pronouncements in *Giordano,* and approving the analysis in *United States v. Chun,* concluded

> "From our examination of the legislative history of this provision, see United States v. Chun, supra, 503 F. 2d at 537 n. 6, 539-40, 542 n. 12, it is our conclusion that this provision plays a central role in the stautory [sic] scheme to limit and control electronic surveillance and that it directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device. United States v. Giordano, supra, 416 U.S. at 527.
>
> "Suppression is required if there is a breach of a Title III provision that directly and substantially implements the congressional scheme to limit the use of electronic surveillance. We have determined previously that the Government had a duty to disclose the identity of Merlo and Lauer, and that this duty was breached. It is our view that the inventory notice provisions have a central role in limiting the use of intercept procedures. For these reasons we argee [sic] with the District Court that the communications of Merlo and Lauer were "unlawfully intercepted," 18 U.S.C. § 2518 (10)(a)(i), and that suppression is required." P.C. App. 17a.

The decision below is based upon clear congressional intent and Fourth Amendment requirements. It is clearly correct and requires no further review.

(b) There is no genuine conflict between the decision below and the decisions of courts of appeal for other circuits.

The petitioner suggests that the decision below "conflicts with decisions of the United States Courts of Appeal for the Third, Eighth, and Ninth Circuits" (Petition for Certiorari, p. 13), and cites as the conflicting decisions *United States v. Iannelli,* 477 F. 2d 999, 1003 (3d Cir. 1973), affirmed on other grounds, 420 U.S. 770 (1975);

United States v. Wolk, 466 F. 2d 1143, 1145-1146 (8th Cir. 1972); *United States v. Chun,* 503 F. 2d 533, 540 (9th Cir. 1974), upon remand 386 F. Supp. 91 (D. Hawaii 1974). *Id.* at fn. 11. Additionally, the petitioner cites *United States v. Smith,* 463 F. 2d 710, 711 (10th Cir. 1972). *Ibid.*

The government asserts that *Iannelli* and *Wolk, supra,* hold that "good faith error in failing to provide notice of an interception is not grounds for suppression where no prejudice results" (Petition for Certiorari, p. 13 fn. 11); that *United States v. Chun, supra,* applied a lesser standard for identification of unnamed persons than that applied in this case (*ibid.*); and that these decisions therefore conflict with the decision below. For the reasons set forth herein, these decisions do not establish a conflict."[7]

In *Iannelli, supra,* the defendant was found to have had actual knowledge of the information required to be set out in the inventory notice prior to the expiration of the 90-day period,[8] and it was this knowledge that caused the

[7] Petitioner also quotes Commentary, *Standards Relating to Electronic Surveillance,* American Bar Association Project on Minimum Standards for Criminal Justice, p. 160 (Approved Draft, 1971) ("A failure . . . to file the inventory . . . should result in the suppression of evidence only where prejudice is shown"). Petition for Certiorari, page 17, fn. 17. The Commentary, as opposed to the black type standards, was not approved by the House of Delegates, does not constitute ABA policy, and at most reflects the predilections of the Drafting Committee. This commentary is inconsistent with this Court's subsequent ruling that "suppression must follow" when "central" statutory requirements have been "ignored". *U.S. vs. Giordano,* 416 U.S. 505, 529 (1974). The source of the Commentary is *Evans v. United States,* 242 F.2d 534 (6th Cir. 1957) cert. den. 353 U.S. 976 (1957). But the Court of Appeals for the Sixth Circuit declined to apply it to wiretap inventories in the decision below.

[8] This fact was commented on in the remand opinion in *United States v. Chun,* 386 F. Supp. 91, 95 (D. Hawaii 1974), as the distinguishing feature justifying suppression in *Chun.*

court to deny suppression. 477 F. 2d at 1003, and see the District Court opinion, *United States v. Iannelli*, 339 F. Supp. 171 (W.D. Pa. 1972). Such knowledge was expressly found lacking in the case at bar.

In *United States v. Wolk*, 466 F. 2d 1143 (8th Cir. 1972), interceptions were concluded in March 1971 and inventories were ordered served the following June, but there was a lack of service upon two of the persons named in the inventory order until after the ninety-day period specified in Section 2518 (8)(d). However, counsel for these two defendants had actual knowledge of the intercepts and an opportunity to examine the transcripts by late July and early August. *Id.* at 1144. In view of the brief delay and actual knowledge the court, in *Wolk*, held that "the statute has been substantially complied with . . ." *Id.* at 1146. In the present case, there has been no substantial compliance with the statute as regards respondents Merlo and Lauer. They had neither notice nor knowledge of the intercepts for more than a year.

Petitioner's reliance on *United States v. Chun*, 503 F. 2d 533 (9th Cir. 1974), is similarly misplaced. In *Chun* (which was briefly discussed at p. 13, *supra*,) the court reversed the granting of a motion to suppress which had been heard prior to the announcement of this Court's holdings in *Giordano* and *Chavez*, and remanded the case for further consideration in the light of those holdings. *Id.*, at 543. In its outline of the considerations to be entertained on remand the court of appeals ruled, as discussed above, that the government must identify the classes of persons overheard (*id.*, at 540) and give prompt notice to those unnamed individuals against whom it has decided to obtain indictments. *Id.*, at 537. The court of appeals also considered the Fourth Amendment underpinnings of Section 2518 (8)(d) and instructed the district court to determine the constitutional question, noting that "[i]f a constitutional

violation is found, then suppression must follow under the judicially-fashioned exclusionary rule." *Id.* at 538. Finding the lack of any information regarding the unnamed persons to have deprived the district judge of his discretion and violated the "spirit and letter of § 2518 (8)(d)" (*id.*, at 540), and acknowledging that "the inventory notice provision is a central or at least a functional safeguard in the statutory scheme" (*id.*, at 542), the court of appeals further instructed the district court to consider whether that violation justified suppression under Section 2518 (10)(a)(i) even if not of constitutional import. *Id.*, at 543.

On remand, the district court again granted the motions to suppress. Having found that the unnamed persons had actual notice shortly after the expiration of the statutory period, the district court ruled that the Fourth Amendment did not require suppression, but that the violation of Section 2518(8)(d) required statutory suppression. *United States v. Chun*, 386 F. Supp. 91, 94-95 (D. Hawaii 1974).

The fourth decision cited by petitioner, *United States v. Smith*, 463 F. 2d 710 (10th Cir. 1972), involved inventory service which was effected merely 30 hours late, after several timely efforts of the marshal proved unsuccessful because the whereabouts of the defendant were unknown. The court of Appeals held it did not have jurisdiction of the appeal on grounds of prematurity (*id.*, at 712), but by way of dictum characterized the delay as "short" (*id.* at 711) and said that a failure of "strict compliance" did not require suppression absent prejudice. *Ibid.* Dictum on the effect of "short delay" hardly establishes the Tenth Circuit's position on any relevant question, and petitioner, while citing *Smith* (Petition for Certiorari, p. 13), refrained from listing the Tenth Circuit as among those assertedly in conflict.

A brief recap of the foregoing authorities demonstrates that no conflict among them exists. The only decision cited by petitioner which addresses the rights of unnamed persons overheard is *Chun, supra*. While *Chun*

left the position of the Ninth Circuit open on the circumstances justifying use of the suppression remedy, it acually provided the authority relied on below concerning the government's duty, under Section 2518(8)(d), to disclose threshhold information to the court on unnamed persons. None of the decisions cited by petitioner disagrees with this holding.

The decisions of the Third and Eighth Circuits, while referring to a requirement of prejudice, did so in the context of brief delay, actual knowledge and substantial compliance as to persons properly named in the inventory order. See *Wolk* and *Iannelli, supra.* The Sixth Circuit has rejected the necessity of a showing of actual prejudice (P.C. App. 16a), but only in the absence of actual knowledge or substantial compliance.

> "There is no suggestion in the present case that the Government fulfilled its duty under the statute *or that there was even a colorable conformity with the statutory requirements.*" P.C. App. 16a.[9] (Emphasis added).

The Sixth Circuit has taken no position on the effect of brief delay, actual knowledge or substantial compliance. Indeed, the emphasis placed by the court below on the finding that respondents had not been "otherwise notified" suggests its willingness to consider actual knowledge as relevant to suppression. P.C. App. 15a.[10]

In short, none of the decisions cited by petitioner appears to be on a collision course with any of the others.

[9] It is this fact which distinguishes this case from *United States v Chavez,* 416 U.S. 562 (1974) and the court below so noted. P.C. App. 16a.

[10] Nor did the court below rule that these respondents were not prejudiced by a delay of more than one year in providing them with notice that their conversations had been intercepted. The delay had a necessary effect of rendering defense investigation stale and providing tactical advantage to the government.

(c) Supreme Court Review of the Allegedly Conflicting Authorities Is Premature.

As indicated above, there is no conflict among the decisions of the courts of appeal for the several circuits. But even if such a conflict were discernible, Supreme Court review would not be timely. Of the decisions cited by petitioner, only *United States v. Chun,* 503 F.2d 533 (9th Cir. 1974) postdated this Court's elucidation of the principles governing suppression under Title III in *United States v. Giordano,* 416 U.S. 505 (1974) and *United States v. Chavez,* 416 U.S. 562 (1974). The Court of Appeals, in *Chun,* expressly declined to establish a rule for the Ninth Circuit without further District Court proceedings in the light of *Giordano* and *Chavez,* and has not spoken on this subject since.

The court below also regarded *Giordano* and *Chavez* as crucial to the charting of principles of suppression applicable to section 2518(8)(d) and expressly rejected the reasoning of *United States v. Wolk,* 466 F.2d 1143 (8th Cir. 1972) because that decision had been rendered prior to *Giordano.* P.C. App. 16a.[11].

This Court has now held that where a provision of Title III was "intended to play a central role in the statutory scheme . . . suppression must follow when it is shown that this statutory requirement has been ignored." *United States v. Giordano,* 416 U.S. 505, 529 (1974). There is insufficient experience under this recent pronouncement to suggest that the federal judiciary will fail to arrive at a harmonious application of *Giordano* to violations of the inventory notice requirements.

[11] *United States v. Cirillo,* 499 F.2d 872 (2d Cir. 1974) cert. den. 419 U.S. 1056 (1974) was rejected for the same reason. *Ibid.* The cases upon which petitioner relies also lacked the benefit of whatever guidance may be provided by this Court's latest pronouncements on the interpretation of Title III in *United States v. Kahn,* 415 U.S. 143 (1974).

(d) The Issue Of Whether Suppression Is Justified By the Government's Failure To Cause An Inventory Notice To Be Served In This Case Presents No Important Issue Concerning The Administration Of Title III.

The government's own position is that it intended to serve inventory notices on Merlo and Lauer (Petition for Certiorari, p. 15), and that it is the policy of the Department of Justice "to provide the supervising judge with the name of every person who has been overheard if there is judged to be any reasonable possibility that the person will be indicted." *Id.* at 12, fn. 10. Therefore, whether the omission of notice to Merlo and Lauer is characterized as deliberate, negligent, or merely inadvertent, a Supreme Court decision on this case will not affect public policy.

Unlike the decisions in *Giordano* and *Chavez*, which were necessary to define the government's obligations in authorizing applications for surveillance orders under Title III, and unlike this Court's decision in *Kahn*, which was necessary to guide the government in naming target individuals in the application for a surveillance order, a Supreme Court determination in this case would not apprise the government of anything it needs to know in the utilization of Title III. All that is in issue is suppression of a wiretap where the government failed to carry out its ostensible plan to give notice to two indicted individuals.

It is too early in the administration of "this relatively new federal statute,"[12] to assume that the government will habitually fail or neglect to furnish the court with the names of positively identified persons against whom it intends to seek indictments.

[12] *United States v. Kahn*, 415 U.S. 143, 150 (1974).

Prior to a demonstration that deliberate or negligent omissions from inventory orders are a chronic problem in the administration of Section 2518(8)(d), review of the suppression remedy for such failures is unnecessary and premature.[13]

[13] Petitioner's final footnote tentatively suggests that "[i]t *may* also be that admission of the incriminating statements of Merlo and Lauer is required by 18 U.S.C. § 3501(a) and (e)." Petition for Certiorari, p. 18 fn. 19. (Emphasis added). This statute, which generally provides procedures and standards for the determination of voluntariness of confessions, does not abrogate the right of an accused to have evidence excluded on other constitutional or statutory grounds. *Cf. United States v. Schipani*, 289 F. Supp. 43, 59-60 (D.C. N.Y. 1968), affirmed 414 F. 2d 1262, cert. den., 397 U.S. 922 (1970). Obviously, 18 U.S.C. § 3501 was not intended to amend the suppression sections of Title III or the exclusionary rule under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, respondents Merlo and Lauer urge this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

BERNARD A. BERKMAN
JOSHUA J. KANCELBAUM
BERKMAN, GORDON & KANCELBAUM
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

Attorneys for Respondents
Joseph F. Merlo and
Jacob J. Lauer

No. 75-212

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v

THOMAS W. DONOVAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

HARRIET S. SHAPIRO,
Assistant to the Solicitor General,

SIDNEY M. GLAZER,
MARC PHILIP RICHMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 513 F. 2d 337. The opinion of the district court (Pet. App. 31a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a-28a) was entered on March 17, 1975. A petition for rehearing with suggestion for rehearing *en banc*

was denied on June 12, 1975 (Pet. App. 29a-30a). On July 2, 1975, Mr. Justice White extended the time within which to petition for a writ of certiorari to August 11, 1975. The petition was filed on August 8, 1975, and was granted on February 23, 1976 (App. 179). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in an application to intercept telephone communications of all persons whom the government has probable cause to believe it will overhear participating in conversations about illegal activities.

2. Whether 18 U.S.C. 2518(8)(d) requires that the government advise the court of the identity of every person whose conversation has been overheard in the course of a wire interception so that the court may determine whether to require that such person be served with notice of the interception.

3. Whether, if the government violated the wire interception statute in this case, suppression of the evidence derived from the intercept is justified.

STATUTES INVOLVED

The relevant statutory provisions are set out in the Appendix to this brief, *infra*, pp. 1a-5a.

STATEMENT

On November 1, 1973, an indictment was returned in the United States District Court for the Northern District of Ohio charging Albert Kotoch, Joseph Anthony Spaganlo, the five respondents (Thomas W. Donovan, Vanis Ray Robbins, Dominic Ralph Buzzacco, Jacob Joseph Lauer, and Joseph Francis Merlo), and ten others with conspiracy to conduct and conducting an illegal gambling business, in violation of 18 U.S.C. 371 and 1955.[1] The indictment was returned after government agents had monitored two telephones of Kotoch and Spaganlo and two of George Florea[2] under court orders authorizing the interception of conversations relating to illegal gambling activities. Respondents were overheard talking about illegal gambling activities with persons using the Kotoch, Spaganlo and Florea telephones. The evidence obtained through these interceptions was suppressed by the courts below.

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[1] After granting the motions at issue here, the district court severed respondents from the remaining defendants for trial. Kotoch pleaded guilty to the substantive count, Spaganlo and another were convicted by the jury of conspiracy, the court dismissed the indictment as to one, and the others were acquitted. Spaganlo was sentenced to 5 years' imprisonment, the first six months of which is to be served in prison and the remainder on probation, and fined $10,000; Kotoch was placed on 3 years' probation and fined $7,500.

[2] George Florea was convicted of a gambling offense under a separate indictment.

The facts upon which the evidence was found to have been illegally obtained may be summarized as follows:

1. On November 28, 1972, the government submitted, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520), an application for an order authorizing the interception of communications involving an illegal gambling business over two telephones listed under an alias of Joseph Anthony Spaganlo in North Olmstead, Ohio, at an apartment used by Albert Kotoch, and two telephones in Canton, Ohio, at the home of George M. Florea (App. 21, 28, 70). The application included an affidavit containing extensive, detailed information from six reliable sources engaged in gambling activities indicating that Kotoch, Spaganlo, and Florea were using these telephones to conduct an illegal bookmaking business, and that as part of that business they would place telephone calls and receive telephone calls from various persons, three of whom were identified by name in the application,[3] over the four telephones (App. 27-50). This information was corroborated by physical surveillance and by telephone company records, which showed extensive personal and telephonic communication among Kotoch, Spaganlo, Florea, and the three other named persons (App. 54-72). Telephone records also indicated that the telephones that were the subject of the application had been used to make

[3] Ernest Chickeno, Raymond Vara and Suzanne Veres.

numerous calls to known gambling figures both within and outside the State of Ohio (App. 63-72), including respondents Robbins and Buzzacco (App. 64-67).

Pursuant to this application and on the same date, Chief Judge Battisti of the United States District Court for the Northern District of Ohio issued an order authorizing the monitoring of the four specified telephones for a maximum of 15 days (App. 75). The order authorized special agents of the FBI to intercept gambling-related wire communications of Kotoch, Spaganlo, Florea, the three other named individuals, and others as yet unknown, to and from the four subject telephones (App. 76-77).[4]

During this interception, the government learned that respondents Donovan and Robbins were talking about illegal gambling activities with the subjects of the monitored telephones (Pet. App. 52a, 57a; App. 101-103, 176).[5]

[4] This original order, which is not in issue here, also provided that status reports were to be filed with the judge on the sixth and tenth days following the date of the order, showing what progress had been made and indicating whether continued interception was needed to discover the exact manner in which the named individuals and others, as yet unknown, participated in the illegal gambling business, the identities of their confederates, and the nature of the conspiracy involved (App. 77). Status reports were filed on December 4 and 8, 1972, and the monitoring was terminated on December 12, 1972 (App. 79, 83, 88).

[5] A person named "Buzz" or "Buzzer", who turned out to be respondent Buzzacco, was also overheard discussing gambling problems with several named targets (Pet. App. 12a);

On December 26, 1972, the government submitted an application for an extension of the original order to allow continued monitoring of the Kotoch-Spaganlo telephones (App. 87). At the same time, a separate application was submitted seeking authorization to monitor an additional telephone, the existence of which had previously been unknown, at the same location (App. 93). A new affidavit accompanied both applications and set forth the results of the previous period of monitoring, the manner in which the additional telephone had been discovered, facts indicating its use in the bookmaking business, and reasons why continued monitoring was necessary (App. 98-106).

On the same date, Judge Contie, also of the Northern District of Ohio, entered two orders granting the applications, one authorizing continued interception over the two telephones previously monitored and another authorizing interception over the newly-discovered telephone;[6] both orders allowed the interceptions of communications of Kotoch, Spaganlo, Florea, two named persons ("Chuck" and "Slyman"), and others

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in addition, calls to respondents Merlo and Lauer were intercepted as early as December 9, 1972 (Pet. App. 18a). None of these individuals was positively identified until after the application for the December 26 order was filed (Pet. App. 12a, 19a).

[6] These orders, although issued separately by the court, were essentially only an extension of the November 28 order; for purposes of clarity, the orders and their applications will be treated as such in this brief.

as yet unknown, concerning illegal gambling activities, for a maximum of 15 days (App. 108, 111).[7]

2. On February 21, 1973, the government submitted to the court a list of 37 names in a proposed order directing service of inventories giving notice of the interceptions. This list was thought to contain all the individuals who could be identified as having discussed gambling over the monitored telephones. Judge Battisti accepted and signed the proposed order, and an inventory notice was thereafter served upon all the persons listed. Respondents Donovan, Robbins, and Buzzacco were served notices pursuant to this order (App. 120-121). On September 11, 1973, the government moved for an order directing the service of inventory notice upon two additional persons, whose identities had been inadvertently omitted from the previous list (App. 124-128). The district court entered an amended order directing service of inventory notice on those two persons (App. 129). Through administrative oversight, respondents Merlo and Lauer were not included in either order and were not served with inventory notices.

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[7] The orders directed that the interceptions were to continue until communications were intercepted that revealed the exact manner in which the persons named and others unknown conducted the illegal gambling business, the identity of their confederates, and the nature of the conspiracy (App. 109-110, 112-113). Progress reports were filed, as required by the orders, on the third and tenth days following issuance of the orders (App. 110, 113, 114, 117). Monitoring terminated after only ten days, on January 4, 1973 (App. 119).

3. Respondents filed motions to suppress evidence derived from the wire interception, and an evidentiary hearing was held. After the hearing, Judge Krupansky, relying on the court of appeals' opinion in *United States* v. *Kahn*, 471 F. 2d 191 (C.A. 7), reversed, 415 U.S. 143, suppressed as to respondents Donovan, Buzzacco and Robbins evidence derived from the December 26 interception, on the ground that the failure to identify them by name in the applications and orders of that date violated 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a) (Pet. App. 52a-53a, 55a-57a). The district court also ruled that, although Merlo and Lauer were not known until after the December 26 application, evidence derived from both periods of interception was required to be suppressed as to them because they had not been served with inventories (Pet. App. 54a).

The government appealed, and the court of appeals affirmed. The panel was unanimous on the identification question (relating to respondents Donovan, Buzzacco and Robbins) but was divided on the notice question (relating to respondents Merlo and Lauer). On the identification question, the court relied on dictum in *United States* v. *Kahn*, 415 U.S. 143, 152, 155, and held that intercept applications and orders must identify all persons whose conversations relating to the criminal activity the government has probable cause to believe it will intercept.[8] After agree-

[8] In *United States* v. *Bernstein*, 509 F. 2d 996 (C.A. 4), petition for a writ of certiorari pending, No. 74-1486, the court

ing with the district court's finding that the government had such probable cause as to Donovan, Buzzacco and Robbins at the time of the December 26 application, the court affirmed the suppression of evidence against them derived from the interception order of that date (Pet. App. 7a-13a).

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reached the same conclusion, on the theory that a broad reading of the identification requirement "fosters conformity with both constitutional and statutory requirements. In particular, it is important to the exercise of (A) executive approval, (B) prior judicial authorization, and (C) subsequent judicial review of interceptions" (509 F.2d at 999-1000). See also *United States* v. *Moore*, 513 F. 2d 485, 493-494 (C.A. D.C.), relying on the *Kahn* dictum in interpreting 23 D.C. Code 547(a)(2)(D) (1973 ed.), which is substantially similar to 18 U.S.C. 2518(1)(b)(iv). The mandate in *Moore* has been recalled pending the disposition of our petition for a writ of certiorari in *Bernstein*. Two other courts have applied the *Kahn* dictum but found that the government did not have probable cause to believe the individual involved would be overheard. See *United States* v. *Russo*, 527 F. 2d 1051, 1056 (C.A. 10), petition for a writ of certiorari pending, No. 75-1218; *United States* v. *Chiarizio*, 525 F. 2d 289, 291-293 (C.A. 2). On the other hand, the Fifth and Eighth Circuits have held that the failure to name other known persons does not render the interception illegal in the absence of a showing of prejudice, assuming that the statute requires the naming of all known suspects, *United States* v. *Doolittle*, 507 F. 2d 1368 (C.A. 5), affirmed *en banc*, 518 F. 2d 500 (C.A. 5), petitions for writs of certiorari pending, Nos. 75-500, 75-509, 75-513; *United States* v. *Kilgore*, 518 F. 2d 496 (C.A. 5), petition for a writ of certiorari pending, No. 75-963; *United States* v. *Civella*, C.A. 8, Nos. 75-1522, 75-1525, 75-1528, 75-1530, 75-1532, decided April 16, 1976. Cf. *United States* v. *Kirk*, C.A. 8, Nos. 75-1359, 75-1364, 75-1365, 75-1386, 75-1429, 75-1449, 75-1542, decided April 22, 1976, suggesting that the statute requires only that the target be named.

On the notice question, the majority held that the government had an implied statutory duty to inform the issuing judge of the identities of Merlo and Lauer, so that the judge could determine whether discretionary notice should be served upon them. Because the government had, albeit perhaps inadvertently, failed to perform this duty, the court affirmed the district court's suppression of evidence against Merlo and Lauer derived from both periods of interception (Pet. App. 13a-17a).

The dissenting judge agreed with the majority's suppression of the evidence against Donovan, Robbins and Buzzacco. He further agreed that there was an implied statutory duty for the government to inform the issuing judge of the identities of all known parties to intercepted communications (Pet. App. 20a). However, he would have held that suppression is not appropriate for a violation of this implied duty in the absence of bad faith or prejudice, neither of which appeared to be present in this case. Accordingly, he would have vacated the suppression order as to Merlo and Lauer and remanded to the district court for further consideration (*id.* at 26a).

SUMMARY OF ARGUMENT

1. Sections 2518(1)(b)(iv) and 2518(4)(a) require that the application for and order authorizing a wire interception identify "the person, if known, committing the offense and whose communications are to be intercepted." We submit that these provisions require the naming only of the primary target

of an investigation—that is, the person whose telephone is to be subjected to surveillance.[9] This result follows not only from the plain language of the statute, but also from its structure, which demonstrates a congressional intent to protect privacy during an interception by minimizing excessive overhearing on the basis of the types of conversation to be overheard, rather than on the basis of the person conversing. The legislative history of the statute supports this interpretation, since it indicates that Congress did not intend Sections 2518(1)(b) and 2518(4) to impose particularization requirements more stringent than constitutionally necessary. Although Congress may have concluded that it was constitutionally necessary to name the primary target of the interception, it could scarcely have believed that the constitution required the naming of all persons likely to be overheard conversing about the offenses under investigation. Finally, there is no reason to believe Congress intended to impose a naming requirement that would significantly impede use of electronic surveillance in law enforcement but which would not safeguard legitimate privacy interests or protect against official abuses.

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[9] There will be situations in which the primary target is someone other than the listed subscriber of the telephone, as, for example, when a business telephone is used by a conspirator who is not the owner of the business, or when a conspirator regularly uses a friend's phone for illicit purposes. As a practical matter, there will rarely be any problem in defining the primary target in those situations.

2. Section 2518(8)(d) provides that "the issuing * * * judge shall cause to be served, on the persons named in the order * * * and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory." All the named parties, and all the parties the court ordered served, received inventories; there was no violation of the express requirements of statute. The court below incorrectly concluded that Section 2518(8)(d) implies an additional government duty to supply the issuing judge with the names of persons overheard. The purpose of the provision, to prevent secret interceptions, does not justify this inference, and a standard requiring the government to provide the judge with a comprehensive list of all identifiable persons overheard is unreasonable.

3. Even if the court below was correct in concluding that the government failed to comply with Sections 2518(1)(b)(iv) and 2518(8)(d), these failures do not warrant suppression of the evidence derived from the interception. Section 2518(10)(a) defines specifically the grounds justifying suppression; failures such as these are not included. In *United States* v. *Giordano*, 416 U.S. 505, 527, this Court interpreted Section 2518(10)(a)(i), the only arguably relevant provision, as embracing "statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." Neither the naming nor the inventory provisions serve

any such function. The explicit provisions of Section 2518(10) render the application of judicially created exclusionary rules inappropriate. In any event, the procedural errors involved here would be insufficient to merit suppression under those rules, since no substantial rights were affected and suppression would serve no useful deterrent purpose.

ARGUMENT

I

THE STATUTE DOES NOT REQUIRE THAT THE APPLICATION AND ORDER NAME EVERY PERSON WHOSE INCRIMINATING CONVERSATIONS THE GOVERNMENT HAS PROBABLE CAUSE TO BELIEVE WILL BE OVERHEARD

The district court found, and the court of appeals did not question, that the application and related documents in this case supported the district judges' findings of probable cause to issue the wire interception orders under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510-2520. The applications detailed facts supporting the conclusion that the individuals whose telephones were to be monitored and other named individuals were having conversations over the described telephones about illegal gambling activities. It follows that, had these named individuals been the only identifiable individuals whom the government had probable cause to expect to overhear conversing about illegal activities on these telephones, the order would

have authorized the interception of all gambling-related conversations over the monitored telephones. Such interceptions would have been authorized not only when the named persons were parties to the conversations, but also when others who had not been suspected of illegal activities spoke over the telephones. *United States* v. *Kahn*, 415 U.S. 143. But the courts below found that Section 2518(1)(b)(iv) prohibits the interception of any conversation of any person not named in the application, if at the time the application was filed the government had probable cause to expect to overhear that person participating in incriminating conversations over the monitored telephones.

The result of this construction of the statute is that persons suspected of wrongdoing before the interception, but not named, obtain a protection that persons not suspected do not get. Not only must overhearing of their innocent conversations be minimized, but their incriminating conversations must be suppressed. This interpretation of the statute serves no rational policy interest: it penalizes the government for careful pre-authorization investigation, while affording those suspected of illegal activities greater protections than those not previously suspected. As we detail below, this result is not supported by the literal language of the statute, the structure of Title III, or the congressional intent, nor are the onerous administrative burdens it would impose on law enforcement officials and the

courts justified by compensating benefits to legitimate individual or public interests.

In our view, the naming requirement was never intended by Congress to impose any obligation with respect to persons who might be anticipated to call in to the monitored telephone from other telephones not under electronic surveillance. Rather, it was only the individual whose telephone was being subjected to surveillance who was to be named—assuming, of course, that probable cause existed to believe that the person was engaging in the criminal activity under investigation. As will be shown below, this construction of the naming requirement is consonant with common sense and with the language and structure of the statute, and its adoption by this Court would in no way compromise the individual and public interests that the statute is designed to foster.[10]

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[10] The principle that persons whose own telephones are not being subjected to surveillance pursuant to a wire interception order need not be named in the order is subject to exception in one category of cases—when a telephone belonging to one individual is to be placed under surveillance because it is regularly used by another person for illicit activities, where the latter is the target of the investigation. For instance, a telephone in a store or tavern may be used by a narcotics conspirator, who is not the proprietor of the business, for transmitting messages about narcotics transactions; or a bookmaker may use the phone in a friend's apartment to receive wagers. In those cases, it may be appropriate to require naming of the criminal actors who are the principal targets of the investigation.

The interpretation we urge is not foreclosed by *United States* v. *Kahn, supra,* 415 U.S. at 155. That case involved the question whether a known user of the target phone whose complicity in the offense under investigation was not known should have been named. The Court concluded that the investigating agents were not required either to name all known users of the telephone, or to investigate them to determine whether there was probable cause to believe they were involved in the offense. The context of the dictum on which the court below relied confirms its plain meaning: that the government is not required to identify presumably innocent users of the target telephone.[11] It does not follow that all persons the government has probable cause to believe will be overheard in illicit conversations must be identified. That contention was simply not before the Court in *Kahn*; it is raised in this Court for the first time in this case.

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[11] The dictum follows an analysis of why Section 2518 should not be read to require the pre-authorization investigation of all likely users of the target telephone. The full paragraph in which it appears states (415 U.S. at 155):

> We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons "as yet unknown" covered by Judge Campbell's order.

A. Neither The Language Nor The Structure Of The Statute Requires The Naming Of All Persons Reasonably Suspected Of Participating In Incriminating Conversations Over The Target Telephone

1. Section 2518(1)(b) requires that the application for wire interception authorization set forth a full and complete statement of facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including, pursuant to subsection (iv), "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Section 2518 (4)(a) contains the same requirement for the interception order: it also must specify "the identity of the person, if known, whose communications are to be intercepted" (see *United States* v. *Kahn, supra,* 415 U.S. at 152). Thus the plain language of both Sections requires simply that "the person" committing the offense—the target of the interception—is to be identified if known.[12] It does not require that "any person" or "all persons" expected to participate in incriminating conversations with the target over the monitored telephone must be so identified. Cf. 18 U.S.C. 2520. The most reasonable interpretation of this statutory language is that although it would or-

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[12] This choice of language was apparently deliberate. The New York statute discussed in *Berger* v. *New York,* 388 U.S. 41, 59, required the identification of "the person *or persons* * * * to be overheard" (emphasis supplied). Congress used *Berger* as a guide in drafting Title III, S. Rep. No. 1097, 90th Cong., 2d Sess., pp. 66, 75 (1968).

dinarily be expected that many persons will be overheard, only the principal target of the interception must be identified. This will almost always be the individual whose phone is to be monitored.[13]

The context of Section 2518(1)(b)(iv) strongly supports this reading of the statute. Section 2518(1)(b) requires that the application include a complete statement of the facts relied upon to justify the belief that the order should issue, including a description of the facilities from which the communication is to be intercepted (subsection (ii)), the type of communications to be intercepted (subsection (iii)) and the identity of the person whose illicit communications are to be intercepted (subsection (iv)). Congress in this provision was thus evidently focusing on a complete description of the telephone to be intercepted—its identification, use, and primary user.

Moreover, elsewhere in Section 2518, when reference is clearly to the principal target, the person whose phone is to be monitored, Congress used language strikingly similar to that in Sections 2518(1)(b)(iv) and 2518(4)(a). For example, the last

[13] This interpretation does not, as suggested by Judge Godbold dissenting in *United States* v. *Doolittle*, 518 F. 2d 500, 501 (C.A. 5), permit the government unlimited discretion in selecting the individual to be named. A special showing would be required to demonstrate that someone other than the listed user of the monitored telephone was the principal target. And if two or more persons are known to be using the telephone equally to commit the offense, and thus are equally targets of the investigation, all must be named. Here, Spaganlo, Kotoch, and Florea would all seem to have been principal targets.

paragraph of Section 2518(4) directs communications common carriers and other persons to provide information, facilities, and technical assistance to accomplish the authorized interception unobtrusively and with a minimum of interference with the services "such carrier * * * or person is according the person whose communications are to be intercepted." Since the only person whose services are likely to be disrupted in accomplishing the interception is the person whose phone is being monitored, in this context it is clear that the "person whose communications are to be intercepted" is the primary target. The same language in 2518(1)(b)(iv) should be interpreted the same way.[14]

In contrast, when Congress wanted to refer to any person who might be overheard during the course of the interception, it did so unambiguously. For example, in Section 2510(11) Congress provided standing to make a suppression motion to "a person who was a party to any intercepted wire or oral communication or a person against whom the

[14] Similarly, Section 2518(3) requires the judge to find probable cause for belief that an individual is committing an offense specified in Section 2516, that communications concerning that offense will be intercepted, and that "the facilities from which * * * the wire or oral communications are to be intercepted are being used * * * in connection with the commission of such offense, or are * * * listed in the name of, or commonly used by such person" (Section 2518(3)(d)). Here, the focus is again on the primary target; the findings of probable cause required clearly relate to him, and not to others with whom he may talk. The assumption again is that the primary target is the person using the phone in the "commission of the offense".

interception was directed." And Section 2518(8)(d) directs the judge to order inventories served upon "parties to intercepted communications" not named in the order, if he determines such notice is in the interest of justice. In sum, if Congress had intended to require the application for an intercept order to identify other probable parties to intercepted conversations, in addition to the principal subject of the monitoring, Section 2518(1)(b)(iv) would have clearly so stated.

2. The structure of Title III also indicates that only the principal target of the interception must, if known, be named in the application and order. Once the principal target is named, all conversations on the target phone relating to the illegal enterprise may properly be overheard. Section 2518(5), on the other hand, requires that interception of conversations not relating to the defined offenses is to be minimized. The statute thus reflects a decision to prevent excessive overhearing by restricting on the basis of the types of conversations to be overheard, rather than on the basis of the identity of the persons conversing.[15] Thus, innocent conversations, even those of a named target of the interception, are protected, while conversations relating to the defined offense are

[15] Since the limitation was drawn in terms of the content of the conversations, it was necessary to provide explicitly that conversations involving crimes other than those identified in the order could be used in evidence (18 U.S.C. 2517(5)). But since there was no limitation based on the participants in the conversation, no such explicit savings provision was necessary concerning the illicit conversations of unnamed users.

not, even though the participants have not been previously suspected (*United States* v. *Kahn*, *supra*, 415 U.S. at 152-154).[16]

The requirement in Section 2518(1)(e) that an intercept application must disclose all previous applications "involving any of the same persons, facilities or places specified in the application" and whether or not the previous application was granted, also reflects congressional understanding that only the target of the intercept need be named in an application. If, as the court below held, the application must identify every person as to whom there is, when the application is filed, probable cause to believe he will be overheard (although his telephone is not being monitored and he is not the primary target of the investigation), persons will often be named who are not in fact overheard. No purpose would be served by requiring that such persons be identified in subsequent applications for intercept orders as having been listed in previous applications.[17] Instead, Section 2518(1)(e) shows that Congress expected only the person whose phone is to be monitored to be named in the intercept ap-

[16] Indeed, as noted in *Kahn*, *supra*, 415 U.S. at 157-158, n. 18, the Senate rejected an amendment which would have required the suppression of conversations of persons not named in the order. 115 Cong. Rec. 14718 (1968) (Amendment 735).

[17] Such a result would be particularly anomalous in view of the fact that the Section does not require the naming in subsequent applications of a targeted user of the telephone originally intercepted if that user was not named in the original application and order because he had not then been identified by name.

plication and order; the judge who is subsequently asked to issue another intercept order is to be informed of all previous applications targeted against that individual.

Section 2510(11) also supports our reading of the naming requirement, although Judge Godbold, dissenting in *United States* v. *Doolittle*, 518 F. 2d 500, 503, found in it a basis for a broader requirement. Section 2510(11) grants standing to seek suppression to any party to an intercepted conversation or "person against whom the interception was directed." As Judge Godbold noted, the Section thus reflects congressional concern for the interests of such persons, and it may be appropriate to read the naming requirement in Section 2518(1)(b)(iv) to include the person "against whom the interception [is] directed" (518 F. 2d at 503). But Judge Godbold erred in interpreting that phrase as including all those whom the government hopes to overhear and ultimately to convict. There are only two classes of people who have standing under Section 2510(11) to move to suppress: parties to intercepted conversations; and the person whose telephone is monitored, *i.e.*, the principal target of the investigation. *Alderman* v. *United States*, 394 U.S. 165, 175, n. 9, 176; S. Rep. No. 1097, 90th Cong., 2d Sess., p. 9 (1968). Thus, it is clear that the person "against whom the interception was directed" is simply the principal target, the same person referred to in Section 2518(1)(b)(iv).

B. The History Of The Statute Supports Our Construction Of The Naming Requirement

The legislative history of the statute supports our interpretation of 18 U.S.C. 2518(1)(b)(iv) as requiring only the naming of the target of the interception: it shows that Congress intended its particularization requirements to reflect the demands of the Fourth Amendment, and did not wish to impose in addition substantial technical requirements for wire interception applications and orders. We submit, therefore, that 18 U.S.C. 2518(1)(b)(iv) should not be interpreted as adding a stringent naming requirement not required by the Fourth Amendment.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was enacted after this Court in 1967 had suggested in *Berger* v. *New York*, 388 U.S. 41, and *Katz* v. *United States*, 389 U.S. 347, that, while electronic surveillance is covered by Fourth Amendment principles requiring probable cause and warrants for searches and seizures, it would be possible to construct a statutory system that would satisfy the Amendment. After *Berger*, Congress considered a bill that was the product of the synthesis of two bills, one drafted before and the other after *Berger* was decided—neither of which contained identification requirements. S. Rep. No. 1097, *supra*, at p. 66; Hearings on Bills Relating to Crime Syndicates, Wiretapping, etc. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st

Sess., pp. 75-79, 1001-1010 (1967). While the bills were pending in committee, this Court decided *Katz*. The bill was then redrafted to conform with *Katz* as well as *Berger;* the identification provisions at issue here were added at that time (see S. Rep. No. 1097, *supra*, at p. 101).

The constitutional standards enunciated in *Berger* and *Katz* thus served as guidelines in drafting Title III (S. Rep. No. 1097, *supra*, at pp. 66, 74-75). While recognizing the need to protect privacy, and emphasizing that unauthorized wiretapping was to be outlawed, the legislative history makes clear that "[t]he major purpose of Title III is to combat organized crime" (*id.* at 70; see *United States* v. *Kahn*, *supra*, 415 U.S. at 151). The Report emphasized the value of electronic surveillance for that purpose, and rejected the argument that the use of this tool by law enforcement officers pursuant to court order would unduly threaten legitimate privacy interests (S. Rep. No. 1097, *supra*, at pp. 71-74). Congress evidently did not intend to circumscribe these efforts more narrowly than is constitutionally necessary. Instead, it summarized the bill as "[l]egislation meeting the constitutional standards set out in the decisions, and granting law enforcement officers the authority to tap telephone wires and install electronic surveillance devices in the investigation of major crimes and upon obtaining a court order" (*id.* at 75). This general intention is also reflected in the brief discussion of Section 2518(1)(b), which states simply, citing *Berger* and *Katz*, that "[e]ach of these requirements re-

flects the constitutional command of particularization" (*id.* at 101).[18]

It would be inconsistent with this legislative history to interpret Section 2518(1)(b)(iv) as imposing a broad naming requirement extending far beyond what is constitutionally necessary. The Fourth Amendment requires warrants to specify the person or place to be searched (in this context, the telephone line) and the things to be seized (here, conversations about particular criminal enterprises). There is no requirement that the person whose property is to be searched or whose things are to be seized be named. Translated into the context of electronic surveillance, therefore, there is no constitutional necessity to name anyone, even if known, in the application or order. See *United States* v. *Kahn*, *supra*, 415 U.S. at 155, n. 15. It may be that Congress read *Berger* and *Katz* as requiring, as a constitutional matter, that the subject of the surveillance be named if known.[19] But it would hardly have read those cases as requiring the naming of all parties likely to be overheard

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[18] Similarly, the intercept order was intended to "link up specific person, specific offense, and specific place [or telephone]," thereby meeting "the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity." *Id.* at 102.

[19] See S. Rep. No. 1097, *supra*, at p. 102, citing, without explanation, *West* v. *Cabell*, 153 U.S. 78, in support of 2518(4)(a)'s naming requirement. *West* deals with the need for proper identification of the subject of an arrest warrant; it has no particular relevance to search warrants.

conversing about the offenses under investigation. In neither case was that issue involved, either directly or by implication.[20]

The discussion of the inventory requirement (Section 2518(8)(d)) in the legislative history also reflects the assumption that only the person whose telephone is to be monitored is to be named in the order (S. Rep. No. 1097, *supra*, at p. 105). As reported out of committee, an inventory was to be served only on "the person named in the order" and could be post-

[20] *Berger* found a New York statute inadequate, *inter alia*, for lack of particularity in describing the conversations to be seized. The targets of the two interceptions there involved had been named in the orders, and there was evidently no claim that the defendant, Berger, should have been named (388 U.S. at 44-45). The Court did not find New York's statutory naming requirement helpful in meeting the constitutional standard of particularity (388 U.S. at 59):

> It is true that the statute requires the naming of "the person or persons whose communications, conversations or discussions are to be overheard or recorded . . . ." But this does no more than identify the person whose constitutionally protected area is to be invaded rather than "particularly describing" the communications, conversations, or discussions to be seized.

In *Katz*, federal agents had monitored a specific suspect's calls by a device attached to a public telephone booth. This violated the Fourth Amendment because it was done without a warrant. The Court noted, 389 U.S. at 354, that "this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized" the monitoring. There was no suggestion that the Constitution required that such a warrant name any person with whom Katz might be expected to converse.

poned for good cause. The discussion in the Senate Report assumes that only a single person, the subject of the surveillance, will be named in the order and thus served with an inventory, and that postponement will be appropriate when interception on a particular phone stops because the subject moves. The reference to the subject is thus clearly to the owner of the phone, the only person to be named in the application or order.

C. A Broad Naming Requirement Would Hamper Law Enforcement Without Protecting Legitimate Privacy Interests

As we have shown, the statutory language and structure as well as the legislative history support a reading of Section 2518(1)(b)(iv) as requiring the naming only of the principal target or targets of the investigation whose telephones are to be monitored, rather than of persons whose phones are not to be monitored but who may be overheard calling in to discuss illegal activities with the principal target. Further support for the conclusion that such a reading is the one intended by Congress can be found in the impracticality of the contrary interpretation adopted by the court of appeals in this case. The court's requirement—that a person must be identified whenever there is probable cause to believe that his conversations relating to the offense being investigated will be overheard—will significantly impede use of electronic surveillance as a law enforcement tool, without safeguarding legitimate privacy interests or protecting against official abuses.

1. A requirement that agents investigating major crimes must make probable cause determinations about all persons who may be overheard during a proposed electronic surveillance would "subvert the effectiveness of the law enforcement mechanism that Congress constructed" almost as much as the similar requirement this Court rejected in *Kahn*, *supra*, 415 U.S. at 153. In the course of an already complex and necessarily fast moving investigation, agents would be required to gather and assess all information known to any government investigator about all persons suspected of complicity in the illegal activity and all persons suspected of communicating by telephone with the subject of the intercept. Such persons may very well be scattered across the country, especially in bookmaking and narcotics cases, and information about them is likely to be in many different government files, keyed to a number of aliases and nicknames.[21] Nevertheless, investigating agents would be required to make two probable cause determinations as to every one of these persons: first, whether he is committing the offense, and second, whether he will be overheard during the interception participating in conversations relating to the offense. See, *e.g.*, *United States* v. *Russo*, 527 F. 2d 1051, 1056 (C.A. 10), petition for a writ of certiorari pending, No. 75-1218. An error of judgment as to either element may result in suppression of the evi-

[21] For example, here both Buzzacco and Spaganlo used aliases (App. 34, 64, 170).

dence, not only against the unnamed conspirator, but even against the named target.[22]

The agents and government attorneys must make these judgments themselves, at least in the first instance, although they will be subjected to judicial reevaluation after the interceptions are completed. The agents cannot realistically present to the issuing judge all information they possess about every suspect who might be overheard, in order to have the judge determine whom to list in the order. Nor, indeed, is it clear what would be the effect of a judge's refusal to list in the order a person named in the application. If the agent errs, the penalty is suppression of evidence of wrongdoing that will often be necessary to convict. The same result may follow even when the existence of probable cause is not apparent at the time of the application, because at a later time a court with knowledge of the results of the interception, may determine that "[a] detached observer could conclude from the evidence available * * * [when the affidavit was prepared] that the government had probable cause to believe" the person would be overheard, *United States* v. *Bernstein*, 509 F. 2d 996,

[22] A failure to name a person whose incriminating conversations with the named target the agent had probable cause to expect to overhear has been held to prohibit the use against the named target of his conversations with the unnamed conspirator. *United States* v. *Picone*, 408 F. Supp. 255 (D. Kan.), appeal pending C.A. 10, No. 76-1027. Cf. *United States* v. *Chiarizio*, 525 F. 2d 289 (C.A. 2); *United States* v. *Bellosi*, 501 F. 2d 833 (C.A. D.C.).

1003.[23] But in many cases, including this one, the problem is that a detached observor could also conclude that no probable cause existed.[24] The agent must then guess, at the peril of possible frustration of aspects of the investigation, which result will ultimately seem appropriate to a court after the investigation is concluded. There is no reason to require such guesses from law enforcement officials, particularly where the decision will not affect where the interception will occur, but simply how many names are included in the application and order in addition to that of the primary target whose telephone is to be monitored. Cf. *Hoffa* v. *United States*, 385 U.S. 293, 311; *Spinelli* v. *United States*, 393 U.S. 410.

[23] The court below evidently used the same test, since in finding that there was probable cause here, it relied on cases affirming a magistrate's finding of probable cause in similar circumstances (Pet. App. 12a).

[24] In the instant case, for example, the agents knew that two of the suspects had made calls to a number in Youngstown, Ohio, listed under an alias of Buzzacco, who was known to have been a bookmaker. During the first intercept, some of the calls overheard involved a "Buzz" or "Buzzer", using a telephone in Niles, Ohio, not listed in the name of any known alias of Buzzacco, discussing general gambling problems with a named target. The court agreed that it was not clear when the government had discovered that Buzzacco had moved his operation to Niles. Nevertheless, on the basis of this record, the court concluded that there was probable cause to name Buzzacco in the renewal application and suppressed all his conversations intercepted pursuant to the renewal order. The evidence on which the court in *United States* v. *Bernstein*, *supra*, 509 F. 2d at 1002-1003, found probable cause to name a conspirator was equally ambiguous.

In order to avoid the frustration of prosecution through the suppression of evidence, law enforcement officers will be required by the decision below to follow a policy of overinclusion in drafting applications, *i.e.*, to identify persons in intercept applications whenever it is possible that a reviewing court subsequently might find that probable cause did in fact exist.

But the practice of including doubtful names also has its drawbacks, both to the prosecution and to the individuals named. Several courts have suggested that improperly naming a person in an interception application and order may justify the suppression of his intercepted conversations. *United States* v. *Kirk*, C.A. 8, Nos. 75-1359, 75-1364, 75-1365, 75-1386, 75-1429, 75-1449, and 75-1542, decided April 22, 1976; *United States* v. *Principie*, C.A. 2, Nos. 75-1175—75-1177, decided March 4, 1976, petitions for writs of certiorari pending, Nos. 75-1393, 75-1394; *United States* v. *Tortorello*, 480 F. 2d 764, 775-776 (C.A. 2), certiorari denied, 414 U.S. 866.[25] As for the additional individuals named in the effort

[25] If the requirement that alternative investigative techniques be shown to be ineffective (18 U.S.C. 2518(1)(c)) applies to all those named in the order and not just to the subject, unnecessary naming could trigger further investigation on pain of suppression. In that case, investigation requirements could easily become so onerous that the utility of wire interceptions as an investigative tool would be negated. In any event, the need for extensive investigation thus generated is exactly what this Court specifically eschewed in *United States* v. *Kahn*, *supra*.

to protect against subsequent suppression, those who are not overheard engaging in illegal conversations will suffer when the intercept papers become public during motions to suppress. In a similar context, the naming of persons as unindicted conspirators in an indictment has been held to impinge on judicially cognizable personal interests in reputation and ability to obtain employment. *United States* v. *Briggs*, 514 F. 2d 794 (C.A. 5).[26]

An expansive reading of the naming requirement thus will significantly complicate law enforcement efforts and subject those named, but not in fact overheard, to predictable harm. These disadvantages might be justified if the requirement protected any substantial private or public interest. But no important interests are served by the inclusion of the names of persons other than the principal target in an intercept application and order.[27] Indeed, the consequences which flow from the failure to name such persons are so insubstantial that we submit that Congress could not have intended to hamper the use of electronic interceptions in combatting major crimes

[26] Moreover, the fact that a person has been named in an intercept order and application may help to support a finding of probable cause for a subsequent arrest or search warrant. Cf. *Jones* v. *United States*, 362 U.S. 257, 271.

[27] The naming requirement does not relate to whether there is probable cause for the issuance of the order. It is clear that, whether or not those who may be overheard are identified, the affidavit must allege facts upon which the issuing judge can base a finding that there is probable cause to issue the order. 18 U.S.C. 2518(4).

by requiring that all persons who may be expected to be overheard must be named.

2. The burdens imposed by the decision of the court below upon those who administer the Act do not achieve any compensating benefits. The innocent user of a monitored facility (or its innocent use by the conspirators) is not thereby insulated from electronic surveillance, nor are abuses by law enforcement officials in conducting interceptions under Title III avoided or reduced.

The chief safeguard for the privacy of the innocent user (and the innocent use by the conspirator) is the minimization requirement of the statute, 18 U.S.C. 2518(5), which requires that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." The inclusion of names in addition to the subject in an application and order will not facilitate minimization.[28] In many cases, all calls must initially be carefully scrutinized to determine whether they relate to the subject under investigation and to detect previously unsuspected conspirators. See *Bynum* v. *United States*, Nos. 74-1445, decided November 11, 1975, slip op. 4 (dissent); *United States* v. *James*, 494 F. 2d 1007, 1020-1021 (C.A. D.C.), certiorari denied *sub nom. Tantillo* v. *United States*, 419 U.S. 1020. In those cases, "the only feasible approach to minimization is the gradual develop-

[28] Instead, more extensive overhearing of the conversations of a named member of the conspiracy may be justified, see *Bynum* v. *United States*, Nos. 74-1445, decided November 11, 1975, slip op. 3-4 (dissent).

ment, during the execution of a particular wiretap order, of categories of calls which most likely will not produce information relevant to the investigation." *United States* v. *Scott*, 516 F. 2d 751, 754-755 (C.A. D.C.), certiorari denied, April 5, 1976 (No. 75-5688).[29]

Nor would a broad naming requirement covering large numbers of persons whose telephones are not to be monitored aid a judge in deciding whether an interception order should issue, or assist him in supervising an intercept. In deciding whether to issue an intercept order, the judge has before him the particulars in the application and supporting papers showing probable cause. If the judge believes more information, including additional names, is necessary, he "may require the applicant to furnish additional testimony or documentary evidence in support of the application." 18 U.S.C. 2518(2). After the warrant is issued, the authorizing judge may require reports concerning "what progress has been made toward achievement of the authorized objective and the need for continued interception." 18 U.S.C. 2518 (6). If the reports are deficient in any particular, the judge can request more specific information, including names of suspects, and can even terminate

[29] While identification of the person whose telephone calls are to be monitored over a particular telephone might be useful in limiting a surveillance to times when the subject is near the phone, identification of persons talking with the subject from unmonitored telephones would not have any similar utility: persons involved in a conspiracy cannot be expected to announce their names at the beginning of every conversation.

the interception. The judge, in short, has ample authority to obtain any information he believes necessary either for the issuance of an order or for the control of the interception. He is not likely to be assisted in his responsibilities by being required to review additional information about all other persons who may be expected to be overheard.[30] Instead, that review may tend to obscure the important issue before him: whether there is probable cause to believe that an individual is committing the offenses under investigation and will be heard discussing them on the telephone to the intercepted, and whether other investigatory procedures are inadequate. 18 U.S.C. 2518(3). His decision whether or not to issue the order turns on the resolution of that problem, not a review of the propriety of identifying various other individuals who may also be overheard.[31]

[30] In order to justify the inclusion of each name, the affidavit would presumably have to list detailed facts and circumstances relating to that person—for example, telephone records, physical surveillance, criminal record, informant information. In addition, if that person had ever been named in a previous application (even if not the subject and if not actually overheard), the details of that application would have to be included. An application involving an investigation of even a moderate-sized conspiracy could easily become voluminous, and the issuing judge inundated with information of little or no relevance to the decision whether to authorize the surveillance.

[31] It has been suggested that the judge's decision to issue the order, or the Attorney General's decision to authorize the application for it, may be affected by knowledge of the identity of persons likely to be overheard in illicit conversations. *United States* v. *Bernstein*, 509 F. 2d 996 (C.A. 4); *United*

The naming of a person in an intercept application and order triggers two statutory requirements: first, if named in an order, he must be served with an inventory, notifying him that the interception was authorized and advising him whether and for how long it was in effect (18 U.S.C. 2518(8)(d)); and second, any subsequent applications to monitor his telephones must disclose all previous applications in which he was named (18 U.S.C. 2518(1)(e)). Neither provision indicates that a policy of naming all suspects in an application would substantially facilitate proper administration of the Act.

Section 2518(8)(d) contains both a mandatory and a discretionary notice requirement: all those named in the order must be notified, as well as those the issuing judge determines (after the interception is concluded) should receive notice in the interest of justice. Thus, whether or not named in the order, a person whose conversations are intercepted will receive notice if the judge so directs. Since, at least as

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States v. *Doolittle, supra*, 518 F. 2d at 501, 503 (dissent). Ordinarily, however, the Attorney General or the judge will not be familiar with the names of such persons, and even where the names are familiar, it is difficult to see how they could properly affect the decision. It has never been suggested that persons expected to be overheard in innocent conversations must be identified, so disclosure would not facilitate a decision to protect recognized innocent persons' privacy by refusing to permit interception. And it can hardly be suggested that Congress intended the Attorney General or a district judge to refuse to authorize an otherwise lawful wire interception merely because they recognized the name of a person who was suspected of complicity.

to those whose own telephones were not monitored, the need for notice turns on whether the individual was in fact overheard in incriminating conversations, not on whether he was expected to be so overheard, the decision as to who should receive notice is most appropriately made after the interception is completed, when its actual results are known. There is no need to notify those who were expected to be overheard, but were not. Thus, the discretionary notice provisions more accurately serve the statutory purposes than would the effect of a broad naming requirement on the mandatory notice provisions.

The purposes of the interception history provisions of Section 2518(1)(e) are likewise not substantially furthered by expansive reading of the naming requirement. Both "judge shopping" for approval of interception applications and the excessive use of wire interceptions directed against any individual are effectively prevented by requiring the disclosure of previous applications to monitor the phones of the subject of the investigation.[32] Naming the subject of

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[32] The court in *United States* v. *Bellosi*, 501 F. 2d 833, 838-839 (C.A. D.C.), suggests that the Section also permits the judge to consider the precedential value of the earlier interceptions, both in terms of the results obtained and the formulation of limitations on the order. These purposes are adequately served by naming only the subject of the order. In addition, the court suggests that the disclosure of previous applications might enable the judge to discover whether information relied on in the current application was derived from prior illegal interceptions. This marginal purpose might be served to some extent by requiring full disclosure of all

the interception will adequately protect against excessive use of electronic surveillance against the same person. It remains conceivable that a person not named might be harassed by interceptions which in actuality are directed against him even though he is not named. Perhaps if such a showing could be made, the courts could appropriately apply the suppression remedy in such a case.[33]

In sum, the language, structure, history and purposes of the statute all indicate that Congress intended to require only that the subject of the investigation, the individual whose telephone is to be monitored, be named in the application order. He is the person whose privacy will be primarily invaded, and naming him, if his identity is known, will focus the issuing judge's attention on the real question before him: whether sufficient grounds have been shown for that invasion. Naming additional people would tend to obscure that question and would impose very substantial additional burdens on law enforcement officials without countervailing benefits to the legitimate interests of those involved.

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interceptions involving all persons who might be overheard. It is not, we submit, substantial enough to warrant imposition of such a requirement.

[33] In such a case, the prosecutor's intent to evade the judicial supervision required by the Act might render the interception unlawful, and thus subject to suppression under Section 2518(10)(a)(i). See *infra*, pp. 46-50.

II

THE GOVERNMENT DID NOT VIOLATE THE ACT WHEN IT INADVERTENTLY FAILED TO GIVE THE ISSUING JUDGE THE NAMES OF TWO PERSONS OVERHEARD IN THE COURSE OF THIS WIRE INTERCEPTION

On February 21, 1973, after the conclusion of the interceptions, the government submitted a list of 37 names in a proposed order directing service of inventory pursuant to 18 U.S.C. 2518(8)(d). This list was intended to include all persons whose conversations the government had overheard during the interceptions.[34] The issuing judge, Judge Battisti, accepted and signed the proposed order (App. 120). Thereafter, an inventory notice was served on all the persons listed. Subsequently, in September 1973, the government discovered that two persons had been omitted from the list. An amended order was submitted to and signed by Judge Battisti, directing service of inventory notice on those two persons (App. 129). Respondents Merlo and Lauer were not named in either order and were never served with inventory notices. They were indicted on November 1, 1973; the indictment was unsealed November 6, and the intercept orders, applications and related papers were

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[34] Although more was provided here, it is the Department of Justice's policy to provide the issuing judge in every case with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment. Additional names are, of course, provided if requested by the issuing judge.

made available to all defendants, including Merlo and Lauer, on November 26, 1973. On December 12, 1973, respondents Merlo and Lauer moved to suppress evidence derived from the interception on the grounds they had not been served with an inventory notice (App. 1, 3, 7, 131, 133). On December 17, 1973, all the defendants, including Merlo and Lauer, received transcripts of the interceptions in which they were overheard (Pet. App. 19a).[35]

Their motions to suppress were granted by Judge Krupansky, who concluded that the government's failure to serve Merlo and Lauer with inventory notices violated the statute and warranted suppression as to them of the intercepted communications (Pet. App. 54a). On appeal, the court of appeals agreed, one judge dissenting, with the district court. It found that the government violated a statutory duty under Section 2518(8)(d) to furnish information to the issuing judge concerning the conversations overheard so that the latter could exercise his discretionary authority to decide whether Merlo and Lauer should be served with notice of interception. The court concluded that suppression was required even in the absence of prejudice to either defendant and even if the omission was the result of "inadvertent error" rather than a deliberate attempt to circumvent the statute (Pet. App. 13a-17a).

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[35] Respondents Merlo and Lauer imply in their brief in opposition to the petition for a writ of certiorari (pp. 2, 5-6) that they first received actual notice of the interception in the government's response to their discovery motions. These motions were filed November 30, 1973 (App. 4).

We submit that there was no violation of the statute here. Section 2518(8)(d) provides that within ninety days after the termination of an intercept order or extensions thereof "the issuing * * * judge shall cause to be served, on the parties named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory." The inventory must include notice of the date the order was entered, the period of authorized interception, and whether or not communications were intercepted during that period. Upon a showing of good cause, the service of the required inventory may be postponed.

Section 2518(8)(d) thus provides for mandatory service of inventory notice on those named in the order and discretionary service on other parties to intercepted communications. There is no express requirement that the government routinely provide the judge with any specific information upon which to base his exercise of discretion, either precise identification of individuals, as the court below required, or descriptions of categories of individuals, as the court found necessary in *United States* v. *Chun*, 503 F. 2d 533, 540 (C.A. 9).[36]

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[36] In *Chun*, the court held alternatively that "[t]o discharge [his] obligation the judicial officer must have, at a minimum, knowledge of the particular categories into which fall all the individuals whose conversations have been intercepted. Thus, while precise identification of each party to an intercepted communication is not required, a description of the general class, or classes, which they comprise is essential to enable

Moreover, no useful purpose is served by reading such a requirement into the statute. It is obvious that in any interception of appreciable length there will be persons overheard participating in criminal-related conversations (some of whom the government expects to indict, and some of whom it does not) and there will also be persons overheard during innocent conversations. After the intercept, it is a simple matter for the judge to ask for the names and addresses of any such persons, or any other information he desires, in order to exercise his discretion with respect to the service of inventories. It is therefore unnecessary to read into the statute a routine requirement to provide the judge with a list of names or categories in the absence of any request by him for such information. When, as here, the government furnishes the names of 39

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the judge to determine whether additional information is necessary for a proper evaluation of the interests of the various parties." Although the court below expressed its agreement with this language (Pet. App. 14a), in fact it went further than requiring simply the description of general classes, when it found that "the Government had a duty to disclose the identity of Merlo and Lauer" (Pet. App. 17a), thus perhaps requiring the "precise identification of each party to an intercepted communication" which the court in *Chun* had asserted was not required. The court below did not, however, define the extent of the duty it imposed on the government. It is unclear whether, under the majority opinion, the government must inform the issuing judge of the names of all persons overheard, or only those overheard in incriminating conversations, or only those it intends to indict. Nor is it clear what degree of certainty of identification is necessary to trigger the implied statutory duty.

persons to the court, and the judge requests no further information on which to base his exercise of discretion, the requirement set forth in the statute is fully satisfied.[37]

Nor does the purpose of Section 2518(8)(d), as revealed by its history, require expansion of the statute beyond the specific requirements of its language. The statutory purpose was to provide for notice to "insure the community that the techniques are reasonably employed" and to make the interception known at least to the subject" of the interception so that he may seek appropriate civil redress "if he feels that his privacy had been unlawfully invaded." S. Rep. No. 1097, *supra*, at p. 105.[38] Obviously, this con-

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[37] We do not, of course, suggest that literal compliance would be sufficient to protect the government from sanctions if it were deliberately to mislead the judge by submitting as complete a list known to be incomplete. Cf. *United States* v. *Bellosi*, 501 F. 2d 833 (C.A. D.C.). Nor would such compliance prevent taking whatever steps, such as continuances to permit preparation for trial, might be necessary to remedy any prejudice to the defendants who were overlooked.

[38] As reported from committee, Section 2518(8)(d) provided only for notice to the subject of the interception. S. Rep. No. 1097, *supra*, at p. 105. The clause allowing for discretionary notice to other parties to intercepted communications was added by amendment on the floor of the Senate. Amendment No. 754; 114 Cong. Rec. 14485-14486 (1968). The purpose of the amendment was to provide for notice to all parties to any intercepted conversations, if that were constitutionally necessary. Otherwise, "since legitimate interests of privacy [*e.g.*, of an intercepted businessman vis-a-vis his legitimate customers] may make such notice to all parties undesirable" (*id.* at 14485), the decision concerning whom to serve was left to the issuing judge for case-by-case deter-

gressional purpose was amply satisfied when 39 persons received formal notice of the interception; this was no secret wiretap.

Even if, as the court below concluded (Pet. App. 14a), it is appropriate to read into the statute some duty on the part of the government to inform the court of those whose conversations have been intercepted, that duty should only require the government to use its best efforts to provide a complete list of such persons. Many people may be heard in the course of a single interception;[39] they will often fail to identify themselves, and they may speak only briefly. In such circumstances, errors in identification and in listing are inevitable, and a standard requiring the government to provide the judge with

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mination. Mandatory notice only to those named in the order has since been held to satisfy the Constitution. *United States* v. *Ramsey*, 503 F. 2d 524, 531, n. 24 (C.A. 7), certiorari denied, 420 U.S. 932; *United States* v. *Tortorello*, 480 F. 2d 764, 774 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Whitaker*, 474 F. 2d 1246 (C.A. 3), certiorari denied, 412 U.S. 953; *United States* v. *Cafero*, 473 F. 2d 489, 498-500 (C.A. 3), certiorari denied, 417 U.S. 918. See also *United States* v. *Cox*, 462 F. 2d 1293, 1303-1304 (C.A. 8), certiorari denied, 417 U.S. 918; *United States* v. *Cox*, 449 F. 2d 679, 685, 687 (C.A. 10), certiorari denied, 406 U.S. 934.

[39] In 1975, the average number of persons overheard per federal interception was 71. *Report on Applications for Orders Authorizing Or Approving The Interception of Wire Or Oral Communications, January 1, 1975 to December 31, 1975*, Administrative Office of the United States Courts, Table 4, p. X (April, 1976). There were 18 federal interceptions in which more than 100 persons were overheard; one involved 459 persons. *Id.* at Table A-1, pp. 2-12.

a comprehensive list of all those who are identifiable is unreasonable. No support for such a flat requirement can be found in the Act. Instead, by requiring the judge to determine case-by-case whether the interests of justice require service of the inventory on persons not named in the order, the statute indicates the appropriateness of a similar case-by-case analysis to determine whether the interests of justice have been adversely affected by the government's failure to identify such persons.

Since Merlo and Lauer received access to the intercept papers and transcripts at the same time as the other defendants, they were not prejudiced by the fact that they received no inventory notice. Thus, the interests of justice were not adversely affected by the inadvertent failure to include them in the inventory lists, and the government should not be held to have violated any implied statutory duty to supply the judge with reasonably comprehensive lists of those overheard.

III

SUPPRESSION OF EVIDENCE IS NOT APPROPRIATE EVEN IF THE COURT BELOW WAS CORRECT IN HOLDING THAT THE PROCEDURES FOLLOWED WERE DEFECTIVE

Even assuming that the failure to name Buzzacco, Donovan and Robbins in the intercept application and order and to identify Merlo and Lauer in the inventory lists submitted to the judge was improper, these failures do not merit suppression of the evi-

dence derived from the interception of their conversations, either under the statute or under traditional judicial principles.

A. The Statute Does Not Authorize Suppression Here

Section 2515 prohibits the use at trial of intercepted communications, or evidence derived therefrom, where disclosure of that evidence would be in violation of the statute. Section 2515 is implemented by Section 2518(10)(a), which defines the situations in which evidence obtained through interceptions is subject to suppression. *United States* v. *Giordano*, 416 U.S. 505, 524. Section 2518(10)(a) permits motions to suppress on the following grounds:

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Contrary to the conclusion of the court below, the defects it identified in the procedures utilized here do not justify suppression under any of the subsections of 2518(10)(a). See *United States* v. *Doolittle*, *supra*, 507 F. 2d at 1371-1372; *United States* v. *Civella*, C.A. 8, Nos. 75-1522, 75-1525, 75-1528, 75-1530, 75-1532, decided April 16, 1976, slip op. 15-19. Obviously neither the failure to serve inventories nor

the failure to name certain individuals in the applications or orders rendered the applicable order of authorization insufficient on its face. And, despite such failures, each interception was carried out in conformity with the applicable order of authorization. Suppression for these failures, if covered at all by Section 2518(10)(a), must be authorized by subsection (i). We submit that the language "unlawfully intercepted" should not be stretched to encompass such failures.

The stretching required would be substantial. Indeed, the opinion below does not suggest any way in which the language of subsection (i) can be read to cover a failure to serve inventories. The subsection has no application to violations of duties arising only after the interception is completed. Even if such subsequent errors occur, the interceptions themselves were lawful, and subsection (i) does not authorize the suppression of communications lawfully intercepted.

The error, if any, in failing to name Buzzacco, Donovan and Robbins occurred before the interception and thus could conceivably have rendered the interception of their conversations unlawful. But their conversations suppressed here were either with named targets or with previously unknown co-conspirators. The government had an unquestioned right, by virtue of the intercept order, to overhear the conversations of the targets and others unknown. Thus, these conversations were scarcely "unlawfully intercepted", even if the court below was correct in con-

cluding that the other participants in them should have been named.

There is a further obstacle to the application of Section 2518(10)(a)(i) to the procedures involved here. That section was construed in *United States* v. *Giordano*, *supra*, 416 U.S. at 524-529, where this Court held that it embraced "any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device" (*id.* at 527). In the related case of *United States* v. *Chavez*, 416 U.S. 562, 574-575, this Court explained that Section 2518(10)(a)(i) does not require suppression for "every failure to comply fully with any requirement of Title III."

Neither the naming nor the inventory requirement tends to limit the use of intercept procedures. Errors in implementing post-intercept notice procedures can scarcely affect the original decision to authorize the interception. The fact that 39, rather than 41, persons were eventually given inventory notices has no bearing at all on whether or not the procedures authorized by Title III should be employed. Thus, *Giordano* and *Chavez* teach that a failure to comply with the inventory requirements is not a defect warranting suppression under 2518(10)(a)(i), even supposing the statutory language could properly be ignored in order to make it encompass irregularities in post-intercept procedures.[40]

Similarly, the failure to name in the application and order all those likely to be overheard in incriminating conversations does not affect the decision whether to authorize the interception. As noted above, that decision turns on whether there is probable cause to believe the target will be overheard engaging in incriminating conversations over the monitored telephone, and whether other investigative procedures are ineffective. The fact that the incriminating conversations of others may also be overheard is simply not relevant to that decision (see *supra*, note 31).[41] The failure to name suspected co-conspirators thus does not invalidate the interception order and render the interceptions of communications pursuant to it "unlawful" within the meaning of 2518(10)(a)(i).

The soundness of this analysis is further supported by the fact that, as in *Chavez*, *supra*, 416 U.S. at 578, there is no legislative history to suggest that the in-

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[40] The result might arguably be different if the intercepting agents knew before the interception that no inventory would be served. Such knowledge might affect the way in which the interception was conducted and thus bring the violation within a broad reading of the *Giordano* rationale. See *United States* v. *Eastman*, 465 F. 2d 1057 (C.A. 3).

[41] It cannot reasonably be argued that disclosure of additional names would tend significantly to limit the use of interceptions due to a judicial desire to protect the privacy interests of those suspected of complicity; innocent users, whose privacy the judge might properly be inclined to protect, would not be named in any event.

ventory or naming requirements "were meant, by themselves, to occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." Instead, as we have noted above, the legislative history indicates that the naming requirement was something of an afterthought and was not intended to operate as required by the court below; and the requirement that the government provide the judge with a complete list of persons overheard is not even explicitly included in the statute. The legislative history of the statutory provisions from which these requirements were derived by the court below is sparse; it surely fails to indicate that they played an important role in the statutory scheme (see, *supra*, pp. 24-25, 43-44).

B. There Is No Reason To Apply A Judicially Created Exclusionary Rule Here

The statute defines explicitly the situations in which suppression is an available remedy (18 U.S.C. 2518(10)) and provides that otherwise evidence obtained pursuant to an authorized electronic surveillance shall be admissible at trial, 18 U.S.C. 2517 (3).[42] We submit, therefore, that the statutory suppression provisions are exclusive, and it is accordingly inappropriate, at least in the absence of a constitutional violation, for the courts to order suppression in situations in which it is not authorized by

[42] See also 18 U.S.C. 3501(a), providing that a confession, defined as including any self-incriminating statement, "shall be admissible in evidence if it is voluntarily given."

the statute. In any event, the procedural errors identified by the courts below do not warrant suppression under the standards of the judicially created exclusionary rule, since no substantial rights of respondents were affected, and suppression would have no useful deterrent effect.

1. There is no suggestion that there was insufficient probable cause to authorize the interception here, that other investigative techniques would have sufficed, or that the conduct of the interception was in any way improper. Thus, it is undisputed that the interception of the conversations of those named in the order, and of those whom there was no probable cause to suspect of complicity, was proper at the time it occurred. In these circumstances, even assuming that additional persons should have been identified in the application and order or served with an inventory, the failure to do so affected no substantial rights.[43]

[43] Other courts of appeals have refused to suppress for errors of the types involved here, in the absence of any showing of prejudice. See *United States* v. *Doolittle, supra* (identification); *United States* v. *Civella, supra* (same); *United States* v. *Bohn*, 508 F. 2d 1145, 1148 (C.A. 8), certiorari denied, 421 U.S. 947 (inventory notice); *United States* v. *Iannelli*, 477 F. 2d 999, 1003 (C.A. 3), affirmed on other grounds, 420 U.S. 770 (same); *United States* v. *Wolk*, 466 F. 2d 1143, 1145-1146 (C.A. 8) (same). Cf. *United States* v. *Smith*, 463 F. 2d 710, 711 (C.A. 10) (same); *United States* v. *Rizzo*, 492 F. 2d 443, 447 (C.A. 2) (same). See also *American Bar Association Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance*, Commentary, p. 160 (Approved Draft, 1971) ("A failure to * * * file

In this case, all the suppressed conversations of Donovan, Robbins, and Buzzacco were with a named target or a person unknown when the application was filed and the order issued. Therefore, the monitoring agents had a clear right under the order to overhear the conversations, and the intercepted conversations were admissible in evidence against the other parties. If the interception had been made with the named target's permission, respondents could not have complained (18 U.S.C. 2511(2)(d); *United States* v. *White*, 401 U.S. 745; *Hoffa* v. *United States*, 385 U.S. 293). The fact that the interception was authorized by a district court, rather than by the target's personal consent, surely should give respondents no greater right to complain. Nor is there any claim here that the failure to name respondents led to the non-disclosure of any information concerning past surveillance of them, even assuming that such evidence might have been relevant to the issuing judge (but see *supra*, n.31).[44] Finally, all three received inventory notices, even though they had not been named. See *United States* v. *Civella*, *supra*, slip op. 18-19.

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the inventory * * * should result in the suppression of evidence only where prejudice is shown"). But see *United States* v. *Civella*, *supra*, slip op. 23, in which the failure to serve inventory notices was held to warrant suppression without consideration of whether prejudice resulted therefrom.

[44] The possibility that a future intercept application may be granted because they were not identified here seems too speculative to be considered a substantial interest warranting suppression now.

Nor did respondents Merlo and Lauer, who received no inventory notices, suffer any impairment of substantial rights. First, as the dissenting judge observed, it "challenges credulity" to conclude that they received no actual notice that their conversations had been intercepted, when inventories were served on 37 of their confederates in February 1973, shortly after the FBI had executed a search warrant on the apartment used by Merlo and Lauer in their bookmaking operations and seized evidence of gambling (Pet. App. 18a-19a, 25a). But even if they received no actual notice until the intercept papers were made available to all the defendants in November 1973, or even, as they allege, until December 1973, this was evidently time enough to permit them to file pretrial motions challenging the sufficiency of the intercept procedures and to prepare for the trial, which has not yet been held.[45]

2. No useful deterrent purpose would be served by suppression here.

As this Court noted in *Michigan* v. *Tucker*, 417 U.S. 433, 447:

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[45] In any event, the primary statutory protection against surprise at trial is 18 U.S.C. 2518(9), which requires that defendants must receive a copy of the order and application 10 days before evidence derived from an intercept is introduced against them. See S. Rep. No. 1097, *supra*, at pp. 105-106. Congress in that Section explicitly made such notice a condition of the admissibility of the evidence. Congress could have similarly made the service of an inventory a condition of admissibility. Since it did not do so, it is inappropriate to add such a requirement by judicial construction.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

See also *United States* v. *Peltier*, 422 U.S. 531, 542.

Neither of the defects identified by the court below resulted from willful, or even negligent, conduct on the part of the investigating officers. Instead, in both instances, the officials acted in complete good faith.

The failure to identify respondents Donovan, Robbins and Buzzacco in the application for the intercept order reflected at most an error of judgment by an investigating agent in a complex and fast moving investigation. In our petition for a writ of certiorari in *United States* v. *Karathanos*, No. 75-1402, we suggest that suppression is not an appropriate means of controlling the magistrate's exercise of judgment in issuing a warrant. Similarly, it is an excessive sanction to apply to correct the investigating agent's judgment about matters to be included in an interception application that are tangential to its main purpose. Although the possibility of suppression if a court eventually disagrees with the agent's judgment can be expected to affect the way in which those

judgments are made—here, by pursuing a policy of overinclusion in selecting persons to be named in the order—that effect may not be salutory (see pp. 31-32, *supra*).

The failure to include respondents Merlo and Lauer in the lists of names of those overheard provided to the issuing judge was an error of the kind that will occasionally occur in the course of a complex investigation; suppression will not deter such non-intentional oversights.[46] It is, in fact, considerably less serious than failure to comply with the requirements of Fed. R. Crim. P. 41(d) that the person at the premises searched pursuant to a conventional search warrant must receive a copy of the warrant and a receipt for property taken, or that the magistrate must receive a return and inventory. It is settled that such failures do not affect the validity of the search and seizure. *United States* v. *Dudek*, 530 F. 2d 684, (C.A. 6); *United States* v. *Hall*, 505 F. 2d 961 (C.A. 3), and cases cited therein; *United States* v. *Harrington*, 504 F. 2d 130, 134 (C.A. 7); *United States* v. *McKenzie*, 446 F. 2d 949, 954 (C.A. 6); *Evans* v. *United States*, 242 F. 2d 534 (C.A. 6), certiorari denied, 353 U.S. 976. Similarly, here, the failure to notify the issuing judge that two additional persons had been heard, so that he could direct service of an inventory on them,

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[46] As the dissent below notes (Pet. App. 24a), the fact that the government filed a corrected inventory list "is a strong indication that the government was not indifferent to its obligations" in regard to inventories.

should not affect the validity of the interception or warrant suppression of the evidence derived therefrom.

In sum, even assuming that the court below was correct in holding that the government should have identified additional people in the application and in the inventory lists provided to the issuing judge, these failures do not merit suppression of the evidence against them obtained in the course of otherwise valid interceptions.

CONCLUSION

For the above stated reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

SIDNEY M. GLAZER,
MARC PHILIP RICHMAN,
Attorneys.

JUNE 1976.

APPENDIX

The Omnibus Crime Control and Safe Streets Act of 1968, Title III, as amended, 18 U.S.C. 2510-2520, provides in pertinent part:

18 U.S.C. 2510. Definitions.

* * * * *

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. 2517. Authorization for disclosure and use of intercepted wire or oral communications.

* * * * *

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

* * * * *

18 U.S.C. 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or

affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * * * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the appli-

cant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted * * *.

(8) * * * * *

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted

communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

* * * * *

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * * *

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In the Supreme Court of the United States

No. 75-212

October Term, 1975

UNITED STATES OF AMERICA,
Petitioner

v.

THOMAS W. DONOVAN,
Et Al.

BRIEF FOR APPELLEE

DOMINIC RALPH BUZZACCO

CARMEN A. POLICY,
Trial Attorney,
Attorney for Defendant,
Dominic Ralph Buzzacco,
424 City Centre One,
P. O. Box 837,
Youngstown, Ohio 44501,
Telephone No. (216) 746-3217.

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No. 75-212

October Term, 1975

UNITED STATES OF AMERICA,
Petitioner
v.
THOMAS W. DONOVAN,
Et Al.

BRIEF FOR APPELLEE
DOMINIC RALPH BUZZACCO

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in an Application to Intercept Telephone Communications of any person whom the Government has probable cause to believe it will overhear participating in conversations about the illegal activities under investigation.

2. Whether, if the Government is required to make such identification in its Applications to Intercept Telephone Communications, a violation of this statutory obligation will result in the suppression of the evidence derived from said intercept.

STATUTES INVOLVED

The relevant Statutory Provisions are set out in the Appendix to the Brief For The United States.

STATEMENT

Appellee generally agrees with the Statement of the Case as contained in the Petitioner's Brief. The five Defendants involved in this case can be separated into two distinct groups on the basis of the issues involved. This Appellee, Dominic Ralph Buzzacco, and Thomas W. Donovan and Vanis Ray Robbins occupy a similar position in terms of the question of identification in the Wiretap Application which was requested by the Government in connection with their investigation of a gambling operation in the Northern District of Ohio. Jacob Joseph Lauer and Joseph Francis Merlo are united in terms of the issue of the subsequent Notice of Inventory which was called for by Title III, Section 18 U.S.C. 2518(8)(d).

Judge Krupansky, of The U. S. District Court For The Northern District of Ohio conducted extensive evidentiary hearings upon the Motion of all the Defendants For Suppression of Evidence obtained in connection with the authorized interceptions of communications involving an illegal gambling business in said district. As a result of said hearings Judge Krupansky found, amongst other things, that the Appellee, Dominic Ralph Buzzacco was not only known to the Government to have been engaged in bookmaking operations in the past and to be involved in this investigation, but also knew that his conversations relating to illegal gambling operations would be intercepted prior to its Application For a Continuance of a Wiretap situation made on December 26, 1972 (Appendix D, Pages 55(a) through 57(a) of Petitioner's Motion For Writ of Certiorari). The Court of Appeals For The Sixth Circuit reviewed Judge Krupansky's factual determination and unqualifiedly concurred in his findings (Appendix A, Pages 10 (a) through 13 (a) of Petitioner's Motion For Writ of Certiorari).

The Petitioner does not take serious issue with this finding in its Brief. The three Defendants, and Appellees herein (i.e., Donovan, Robbins and Buzzacco), are treated in exactly the same light in connection with the Government's Brief.

SUMMARY OF ARGUMENT

1. Sections 2518(1)(b)(iv) and 2518(4)(a) require that the Application for an Order Authorizing a Wire Interception identify "the person, if known, committing the offense and whose communications are to be intercepted." It is submitted that these provisions are very clear in requiring that the Government name any such person whose conversations the Government has probable cause to believe will be intercepted in connection with said surveillance so long as the conversations deal with the illegal subject matter of the investigation. The authority to intercept communications by use of a wiretap is in general derogation of the existing prohibition against such interceptions by any person, or organization, including the United States Government. Therefore, the Statutory allowance for such interceptions must be viewed and interpreted as imposing strict restraints upon this expansive search and intrusion of the privacy. The object of a wire interception is not simply to invade the privacy and conduct a search of the conversations of the so-called primary target but is also designed to have a similar effect upon others who by necessity would be engaging in similar conversations with said primary target.

In this situation the Government would not have been subjected to a long, time-consuming and detailed investigation to determine the identity of parties to be included in the Application For The Continuation of The Wire Interception. They either knew the identity of the Defendants, Donovan, Robbins and Buzzacco, or could very

easily have determined said identity. To require only the naming of the target of investigation ignores the fact that the very nature of a wire interception by necessity includes at least two parties to constitute a conversation (Also, the fact that an integral element of the crime being investigated, i.e., Title 18, Section 1955, requires the involvement of five or more "primary targets". Emphasis this point.)

This Honorable Court in the case of *United States v. Kahn*, 415 U.S. 155 established that Title III required the naming of a person in the Application or Interception Order when law enforcement authorities had probable cause to believe that the individual was committing the offense for which the wiretap was sought. This was established by the Court in its determination that the Defendant in that action should not prevail in her Motion For Suppression due to the fact that the Government did not have probable cause to believe that her conversations would be intercepted in connection with her complicity, or involvement in a gambling business which was under investigation. One cannot help but read the *Kahn* Decision as saying that had the Government realized Minnie Kahn probably was engaged in the gambling operation and that her conversations would have been intercepted, they would have been required to make this fact known to the District Judge when the Wiretap Order Application was submitted for approval.

2. Recognizing the Statutory obligation to name those individuals which the Government has probable cause to believe will be intercepted and has further probable cause to believe are engaged in the illegal activity under investigation, the failure to perform this Statutory duty should result in a suppression of any evidence obtained as it would relate to those specific individuals failed to be mentioned. Any aggrieved person may move to suppress the contents

of intercepted communications, or evidence, if the communication was unlawfully intercepted according to 2518(10)(a)(i). Furthermore, an aggrieved person is defined in 18 U.S.C. 2510(11) as follows:

> "'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

The Appellees, Donovan, Robbins and Buzzacco, certainly qualify as aggrieved persons and have standing to question and move for the suppression of the evidence which was obtained against them in connection with the Continuation of the Wiretap by the December 26, 1972 Application.

This Honorable Court in the case of *United States v. Giordano*, 416 U.S. 505 established that suppression is the proper remedy in connection with certain Statutory violations. The failure to name Buzzacco and the other Appellees in the Application of December 26, 1972 was a Statutory violation which unlike the Inventory Notice situation did not come after the fact of the interception but preceded said invasion of privacy. As such, it is one of the Statutory violations referred to in the *Giordano* Court as requiring suppression.

ARGUMENT

I

The Statute Requires the Identification in an Application to Intercept Telephone Communications of Any Person Whom the Government Has Probable Cause to Believe It Will Overhear Participating in Conversations About the Illegal Activities Under Investigation.

The Government repeatedly took great pains in its Brief to suggest that Section 2518(1)(b)(iv) and 2518(4)(a) are directed to the so-called "target" of the au-

thorized wiretap. It is their contention that only the "principal target" of the interception must be identified and that Congress was focusing its efforts to require detailed and complete descriptions in connection with the telephone to be intercepted more so than the parties' conversations that would be overheard.

There is no question but that the Government sought the authority to intercept the wire communications of certain individuals to facilitate their investigation of gambling operations in the Northern District of Ohio. The primary violation that was under investigation was that of Title 18 U.S.C. Section 1955. Said Section requires that five or more individuals engage in the operation of an illegal gambling business. In connection with such an investigation it would seem that the Government must be looking to establish at least five "principal targets" of the interception that they were seeking. There is no question that as the interception began and more facts and identities were learned that until the renewal was sought any information gained would have been admissible and proper. However, on December 26, 1972, the Government was aware of certain relevant and incriminating facts including the identities of Donovan, Robbins and Buzzacco and the fact that they were involved in conversations relating to the gambling business under investigation. At this point they had become possible "principal targets". They were not only principal targets for the anticipated continuation of the wiretap but they were also principal targets for the subsequent indictments which were to follow.

A clear and unstrained reading of Sections 2518(1)(b)(iv) and 2518(4)(a) dictate that a Statutory obligation is placed upon the Government when seeking authority to intercept communications to name the individuals committing offenses which are the subject matter of the investi-

gation for which the wiretaps are sought. This Honorable Court in *United States v. Kahn*, 415 U.S. 143, 155 (1974), stated that:

> "Title III requires the naming of a person in the Application, or Interception Order, only when the law enforcement authorities have probable cause to believe that that individual is committing the offense for which the wiretap is sought."

One cannot read the *Kahn* Decision without inescapably arriving at the conclusion that the Court is also saying that Title III definitely requires the naming of a person in an Application or Interception Order when law enforcement authorities have probable cause to believe that the individual is committing the offense for which the wiretap is sought. This interpretation of *Kahn* and Sections 2518(1)(b)(iv) and 2518(4)(a) was applied by the Sixth Circuit below and the Fourth Circuit in the case of *United States v. Bernstein*, 509 F.2d 996. Footnote No. 8 on Pages 8 and 9 of the Petitioner's Brief discusses other authorities who have likewise followed the *Bernstein* ruling.

II

The Government Is Required to Make Such Identification in Its Applications to Intercept Telephone Communications, or a Violation of This Statutory Obligation Will Result in the Suppression of the Evidence Derived from Said Intercept.

Assuming that the Government did violate a Statutory duty to name and identify Donovan, Robbins and Buzzacco in its December 26, 1972 Application, then suppression would be the only remedy that would guarantee adherence to the congressionally established safeguards built into Title III. Suppression of Evidence derived from Wire Interceptions is governed by 18 U.S.C., Section 2518(10)(a). We would agree with the Government that the Statutory basis for the Appellees' request for Suppression is to

be found in sub-paragraph (i) which refers to Unlawfully Intercepted Communications.

This Honorable Court has ruled in the case of *United States v. Giordano,* 416 U.S. 505 that some Statutory violations of Title III would come under sub-paragraph (i) of Section 2518(10)(a) and would result in Suppression of Evidence obtained as a result of this unlawful interception:

> "But it does not necessarily follow, and we cannot believe, that no statutory infringements whatsoever are also unlawful interceptions within the meaning of paragraph (i) (l) the words 'unlawfully intercepted' are themselves not limited to constitutional violations and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device (page 527)."

The Statutory violation involving the Appellees, Donovan, Robbins and Buzzacco, must be viewed in a far different light than the Notice violations involving Merlo and Lauer. Unlike a Notice or Inventory situation which is after the fact, the naming requirement and identification mandated by Congress is designed to provide the judicial officer with relevant and important information relating to individuals who are to become the subject matter of a wire interception. This did not take on the aspect of a ministerial task and cannot be equated with the return of an Inventory in a typical search warrant situation or a typographical error in the naming of the party authorizing a wiretap.

Each Application For a Wiretap, whether it be an Application For a Continuation of an Existing Tap, or the Application For The Original Tap, must abide by the Statutory regulations contained in Title III. There can be no doubt but that Donovan, Robbins and Buzzacco were

principal targets in the investigation being conducted by the Government by the time they approached the Federal Court on December 26, 1972, with their Applications seeking a Continuation and Extension of an Existing Tap. The failure of the Government to name these individuals in said Application was a failure to satisfy a Statutory requirement to provide safeguards to the citizenry in connection with the use of this pervasive means of invading one's privacy.

One might reasonably argue that the Statutory violation contained in *United States v. Giordano,* Supra was more of a ministerial violation than that contained in this matter before the Court. The *Giordano* Application was submitted to the Court of the District in question which contained adequate probable cause. All of the other details and regulations and rules had been abided by and the procedures appeared faultless. Yet the Court found that the delegation of the actual granting of approval to utilize a wiretap to somebody other than one of those specifically designated by Statute to have such authority was not only a Statutory violation but one which required suppression. In this case, the Government failed to include Donovan, Robbins and Buzzacco in their Application thereby committing a substantive violation of the Statutory regulations.

Accepting this Court's Decision in the case of *United States v. Chavez,* et al, 416 U.S. 562 to the effect that not all Statutory violations, no matter how insignificant, will result in Suppression of Evidence, one cannot help but recognize the glaring difference between the factual situation of *Chavez* and the Statutory violation involving Donovan, Robbins and Buzzacco. Nothwithstanding the fact that the Court did not mandate suppression under the circumstances of *Chavez,* it did say at Page 580:

> "Though we deem this result to be the correct one under the Suppression Provisions of Title III, we also deem it appropriate to suggest that strict adherence

> by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed on it when authority to engage in wiretapping, or electronic surveillance, is sought."

The D.C. Circuit succinctly stated the reasons justifying suppression in a situation such as this in the case of *United States v. Bellosi*, 501 F.2d 833, 837:

> "By asking us to refashion another clearly worded provision in Title III in a way that would somewhat ease another of the 'stringent conditions' with which a law enforcement agency must comply before conducting an interception, the Government effectively asks us to do what the *Giordano* Court would not. Section 2518(1) is no less important than 2516(1) to Congress' legislative scheme to allow only limited governmental interception of wire or oral communications. Section 2518(1) provides that the judge from whom interception authorization is sought be provided with a detailed and particularized application containing that information which Congress thought necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs. See *United States v. United States District Court*, 407 U.S. 297, 302, 92 S. Ct. 2125, 32 L.Ed. 2d 752 (1972)."

CONCLUSION

For the above stated reasons, the Judgment of the Court of Appeals should be sustained.

Respectfully Submitted,

CARMEN A. POLICY,
Trial Attorney,
Attorney for Defendant,
Dominic Ralph Buzzacco,
424 City Centre One,
P. O. Box 837,
Youngstown, Ohio 44501,
Telephone No. (216) 746-3217.

Supreme Court of the United States

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vs.
THOMAS W. DONOVAN, *et al.*,
Respondents.

BRIEF OF RESPONDENTS MERLO AND LAUER

BERNARD A. BERKMAN
JOSHUA J. KANCELBAUM
BERKMAN, GORDON, KANCELBAUM AND LEVY
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245
Attorneys for Respondents Joseph F. Merlo and Jacob J. Lauer

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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Respondents.

BRIEF OF RESPONDENTS MERLO AND LAUER

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the government has the duty to exercise some degree of care in furnishing to the District Court the identity of persons unnamed in a wiretap order whose conversations have been overheard in the course of interception and against whom the government intends to obtain indictments, so that the court may exercise its statutory discretion under 18 U.S.C. §2518(8)(d) to serve persons not named in the interception order with the inventory notice.

2. Whether suppression of a wire interception is justified where through advertence or gross negligence the

government failed to supply the District Court with the names of individuals whose conversations were secretly intercepted, so that the District Court was misled into omitting them from its inventory order, and where the persons whose conversations were intercepted had neither actual notice nor statutory notice of the interceptions and did not learn of the interceptions except in response to their post-indictment discovery motions more than a year after the interceptions occurred.[1]

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The principal relevant statutory provisions are set out in the Appendix to the petitioner's brief at pp. 1a-5a. In addition, this case involves 18 U.S.C. §2515, appended hereto at p. 35, *infra*, and the Fourth Amendment of the United States Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

1. The additional question raised in the Petitioner's Brief, concerning the extent of the government's obligation to identify probable subjects of interception in its application for a wiretap order, does not apply to respondents Merlo and Lauer, on behalf of whom this brief is submitted. The District Judge ruled that there was no error in not naming these respondents in the wiretap order (See Brief for the United States, hereinafter sometimes called "Brief" where the context permits, Question Presented No. 1, p. 2 and Statement of Facts, p. 8).

COUNTERSTATEMENT OF THE CASE

History

Respondents Merlo and Lauer were indicted on November 1, 1973, along with respondents Donovan, Robbins and Buzzacco, as well as others not parties to this review, on charges of conspiracy to operate and operation of a gambling business in violation of 18 U.S.C. §§371 and 1955 (App. 17-20).

On November 30, 1973, these respondents filed motions for discovery (App. 4), pursuant to which they learned that the government intended to introduce about twelve telephone conversations, in which they were identified as parties, which had been intercepted by wiretap between December 9, 1972 and January 3, 1973.[2]

Respondents Merlo and Lauer filed motions to suppress these interceptions on December 12, 1973 (App. 131, 133) arguing, *inter alia*,[3] that they had not been served with an inventory notice apprising them of the wire intercepts, in accordance with §2518(8)(d) of Title 18, U.S.C.

2. The government urges that these respondents learned of the interceptions on November 26, 1973 when these papers were "made available to all defendants. . . ." (Brief for the United States, p. 40). However, the court below found that "[t]he only evidence of notice [of the interceptions] in the record is in response to Merlo's and Lauer's motions for discovery, filed after their indictments and more than a year after the actual interceptions." Even if the government's contention on this point were correct, the delay would remain approximately a full year.

3. The motions to suppress filed by Merlo and Lauer also argued that their names were improperly omitted from the wiretap order. The District Judge found that there was "insufficient evidence on the record indicating that the government anticipated interception of their communications . . ." and thus overruled this alternative branch of their motion to suppress (P.C. App. 54a), although it accepted the argument of the remaining respondents that they should have been named in the order.

(*Ibid.*). Their motions were sustained on this ground on January 17, 1974.[4]

The government appealed the decision to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court's decision on March 17, 1975. On August 8, 1975, the government filed its petition for certiorari in this Court. The petition was granted on February 23, 1976 (App. 179).

Facts

The wiretaps in question were made pursuant to an order entered by a District Judge on November 28, 1972, authorizing interception of communications of six named individuals "and others, as yet unknown" to and from four designated telephones for fifteen days (App. 75-78). On December 26, 1972, additional orders were entered modifying the November 28 order, extending it for an additional fifteen days, and enlarging the surveillance to include an additional named individual and an additional telephone (App. 108-110). Respondents Merlo and Lauer were not named in either the November 28 or the December 26 orders.

On February 21, 1973, a District Judge ordered the government to serve an inventory notice upon thirty-seven persons whose communications had been intercepted (App. 120-121), including many persons who had not been named in the interception order. The names of the persons upon whom the judge directed service of notice had been furnished to the court by an attorney with the Justice Department, who in turn had received

4. The opinion of the District Court for the Northern District of Ohio sustaining the motions to suppress is reproduced in the appendix to the Petition for Certiorari herein (cited "P.C. App."). P.C. App. 54a.

the names from an F.B.I. agent (App. 158). Merlo and Lauer were not among those named in the inventory order and were not served with the required statutory notice.

The list of persons to be served was prepared by the government on the basis that all persons "positively identified" were to be served with notice (App. 153). However, on September 11, 1973, the government filed a motion for an amended inventory order, representing in substance, that two persons, named Harvey Trifler and James Blank, had not been included in the inventory order and had not been served with notice by reason of "administrative oversight" (App. 125). The motion was granted (*Id.*, at 129-130). Merlo and Lauer were neither named in the motion for an amended inventory order, nor did they receive notice pursuant to the amended order.

Merlo and Lauer were well-known to the government and were positively identified suspects in the investigation by not later than January of 1973. The twelve separate conversations involving these respondents were intercepted between December 9, 1972 and January 3, 1973 (App. 159), and led to an F.B.I. search of premises at 21 Olive Street, Akron, Ohio, on January 13, 1972 while Merlo and Lauer were present (App. 160-161). During the suppression hearing, the government witnesses testified that at the time of the search, Merlo and Lauer expressly admitted to the F.B.I., acting under the supervision of the Strike Force, that they had used the tapped phones in the business conducted at the premises (App. 163). Special United States Attorney Edwin Gale admitted, albeit reluctantly, that by January 18, 1973, the tapes of the telephone conversations and the interview reports concerning the incriminating admissions were in the hands of appropriate representatives of the federal government (App. 165). Nevertheless, as the govern-

ment witnesses conceded, Merlo and Lauer never received either "formal" (App. 157, 165) or "informal" (App. 157) notice of inventory.

In his consideration of the motions to suppress filed on behalf of defendants Merlo and Lauer, District Judge Robert B. Krupansky found that "defendants Merlo and Lauer were not served with inventories pursuant to the Act or otherwise notified that they had been intercepted" (P. C. App. 54a), and that "in the interests of justice their communications must be suppressed" (*Ibid.*).

The decision of the District Judge to cause inventory notices to be served on the 37 persons listed in the order of February 21, 1973 (App. 120-121) and the two additional persons listed in the amended order of September 11, 1973 (App. 129-130) was induced by the government's own policies and administrative decisions. The petitioner's brief describes the policy of the Department of Justice as follows:

> "Although more was provided here, it is the Department of Justice's policy to provide the issuing judge *in every case with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment.* Additional names are, of course, provided if requested by the issuing judge." Brief for the United States, p. 39, n. 34. (Emphasis added).

In keeping with this policy, the government attorneys testified that the decision as to whom inventory notices were to be sent was, in effect, made by them.

> Q. ". . . Now, with respect to the service of inventories, how did you reach a conclusion to serve an inventory on a certain individual?"

> A. "Persons who were positively identified during the course of the electronic intercept were served with the inventory."
>
> Q. "And how did you derive that type of information?"
>
> A. "This information was supplied to me by Special Agent Ault." (App. 153; see also App. 154).

There is no suggestion in the record that the government sought any excuse from compliance with its policy in this case, or any lesser standard of furnishing inventory notices.

The record discloses no reason for the omission of notices to Merlo and Lauer.[5] While "administrative oversight" was the reason given to the trial judge for omission of notice to Trifler and Blank (App. 125), the witnesses offered no such reason for failure to list Merlo and Lauer after they had been positively identified, and neither of the courts below made any finding of inadvertence.

Although the government urges that Merlo and Lauer must have received actual notice of the eavesdropping upon their conversations when other defendants received notice (Brief, p. 53), there is no evidence in the record to support this supposition, and the trial judge expressly found that "defendants Merlo and Lauer were not served with inventories . . . *or otherwise notified* that they had been intercepted. . . ." (P.C. App. 54a) (Emphasis added). Nor can actual knowledge be inferred under these circumstances. As the Court of Appeals below noted:

---

5. The government's characterization of the omission as "inadvertent" (Brief, pp. 7, 39-40, 45) and "administrative oversight" (Brief, p. 7) is unsupported by record references. Also unsupported is the explanation to the court below that the omission resulted from "an apparent lack of communication between the FBI and the prosecutor." 513 F.2d at 343.

> "Others may have communicated the fact of interception to Merlo and Lauer, but this would not necessarily lead them to believe that they had been intercepted. It is just as reasonable to assume that Merlo and Lauer would believe that, since they had not received notice, their conversations were not intercepted." 513 F.2d at 343.

The Court of Appeals held that the specific finding of the trial court that these respondents had not been "otherwise notified" demonstrated to its "satisfaction that the District Court has considered and decided the issue of actual notice." *Ibid.* The government's contention on that subject is now foreclosed. As the Court below determined:

> "[T]he only evidence of notice in the record is in response to Merlo's and Lauer's motions for discovery, filed after their indictments and more than a year after the actual interceptions. If these defendants had never been indicted, they might well have never received notice of the interceptions." *Ibid.*

SUMMARY OF ARGUMENT

1. Section 2518(8)(d) of the Omnibus Crime Control Act of 1968 requires the judge who issues a wiretap order to "cause to be served, on the persons named in the order . . . and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory." Respondents Merlo and Lauer were not served with such a notice although all other persons overheard and indicted in this case were served. The failure of service was due to the government's negligent or deliberate omission of their names from a purportedly complete list of persons to be

served, which the government had furnished to the Court. The Court below correctly ruled that Section 2518(8)(d) implicitly requires the government to furnish to the trial judge a threshold classification of persons overheard so that the judge can intelligently exercise his discretion to cause service of notice upon them. However, irrespective of the existence of such a duty, in this case the judge would have caused service of notice upon Merlo and Lauer had he not been misled, and as a result, Section 2518(8)(d) was violated.

2. Suppression pursuant to 18 U.S.C. Section 2518(10)(a) is required as the remedy for substantial violations of the inventory notice provisions of Section 2518(8)(d). The inventory notice provisions play a central role in the statutory scheme, and directly implement the congressional intention to limit the use of intercept procedures, in that the inventory notice is the only notice which prevents the wiretap from being totally and perpetually secret, in violation of the Fourth Amendment and the privacy concerns of the framers of Title III of the Omnibus Crime Control Act. Thus suppression is mandated by *United States v. Giordano*, 416 U.S. 505 (1974). A violation of Section 2518(8)(d) results in an unlawful interception within the meaning of Section 2518(10)(a). In view of the foregoing factors, suppression should be available to redress any substantial violation of the inventory notice requirements, irrespective of whether the violation was inadvertent and irrespective of any specific showing of prejudice to the defendant. However, even if a narrower standard of suppression is set by this Court, suppression of the Merlo and Lauer intercepts must stand because the failure to serve them was at least negligent, they never were served with statutory notice, and received no actual knowledge for over a full year, so that the violation of §2518(8)(d) in this case was substan-

tial and prejudice necessarily occurred. Suppression for lack of an inventory notice is also directly required by the Fourth Amendment, and its imposition will cause no undue administrative burden upon the government, which under its current policies already notifies the court of the identity of all persons overheard in wiretaps whom it intends to indict.

ARGUMENT

I. THE GOVERNMENT FAILED TO PERFORM ITS DUTY TO SUPPLY THE DISTRICT COURT WITH SUFFICIENT INFORMATION CONCERNING PERSONS OVERHEARD IN WIRETAPS TO ENABLE THE DISTRICT COURT TO EXERCISE ITS DISCRETIONARY AUTHORITY TO SERVE THEM WITH NOTICE UNDER 18 U.S.C. §2518 (8)(d).

For the reasons expressed in the following paragraphs, (A) the court below correctly ruled that it is the duty of the government to supply the trial judge with at least a minimum amount of threshold information concerning the identity of persons overheard in wiretaps in order to enable the court to exercise its discretionary authority to serve them with notice pursuant to 18 U.S.C. §2518 (8)(d); and (B), irrespective of whether the government has such an obligation, its conduct in this case resulted in a violation of the inventory notice provisions of Title III because it misled the district court in furnishing a list of persons to be served which purported to be complete, but which contained omissions which were at least negligent.

A. Some duty to supply threshold information to the trial judge must rest upon the government.

This case involves the effect of the government's having misled the court into omitting names from the inventory orders by furnishing a purportedly complete list of the names of persons to be served. Although the government asserts that this case presents the question whether the government must "advise the court of the identity of every person whose conversation is overheard in the course of a wire interception" (Brief, p. 2), no such sweeping issue is presented. Even if there were no duty upon the government to volunteer a list of persons overheard, having done so it must be held accountable for the results of its lack of care. However, under the statutory scheme of Title III, the government has an implied duty to furnish at least threshold information to the trial judge concerning persons unnamed in the interception order who have been overheard.

Title III is silent on the duty of the government to inform the court of the identity of persons overheard. It merely provides, in pertinent part, that

> "Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, *and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice*, an inventory which shall include notice of—
>
> (1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted. . . ." 18 U.S.C. 2518(8)(d) (Emphasis added).

It is obvious, as the court below noted, that

"[t]he judge has no independent information as to the unnamed parties who have been overheard on the intercepts and must depend on the Government to disclose that information in order that he may exercise his discretion." 513 F.2d at 342.

For this reason, the government's position that it is not required to assist the court (Brief, pp. 41-42) is untenable. The question is not whether there is a duty, but the extent of the duty.

Although the government urges that the Court below required the identification by name of *all* persons overheard (Brief, pp. 2, 42), it did not do so. It adopted the less onerous standard promulgated in the Ninth Circuit, which requires the government merely to classify the persons overheard for the trial judge by description of the general classes which they comprise, and to supply further detail only if desired by the judge and available to the government. The Court below stated:

"We agree with the following holding in United States v. Chun, 503 F. 2d 533, 540 (9th Cir. 1974):

'[A]lthough the judicial officer has the duty to cause the filing of the inventory, it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to *classify all those whose conversations have been intercepted, and to transmit this information to the judge.* Should the judge *desire* more information regarding these classes in order to exercise his §2518(8)(d) discretion, we also hold that the government is required to furnish such information *as is available to it.* It is our belief that this allocation of responsibilities between the executive and judicial branches of government will best serve the dual purposes underlying Title III.' (Footnote omitted.)" 513 F.2d at 342-342. (Emphasis added).

The government's assertion that the Court below may have imposed a more rigorous duty than that delineated in *United States v. Chun,* 503 F.2d 533 (9th Cir. 1974), by requiring "precise identification",[6] fundamentally misconcieves the manner in which the *Chun* standard applies to this case. The government concedes that "it is a simple matter for the judge to ask for the names . . . of any such persons, or any other information he desires, in order to exercise his discretion with respect to the service of inventories." (Brief, p. 42). However, where the judge is presented with a purportedly complete list of precisely identified persons, he would have no occasion to ask for any precise identifications which he might desire because such identifications have been furnished already. This conclusion is as true under the *Chun* standard as under any other standard which might be formulated.[7]

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6. Brief for the United States, p. 42, n. 36.

7. Other cases which have denied suppression for failure to serve inventory notices have done so on the basis of the appropriateness of the suppression remedy, rather than on the lack of a governmental duty to supply information. See *United States v. Bohn,* 508 F.2d 1145, 1148 (8th Cir. 1975), *cert. den.,* 421 U.S. 947 (1975); *United States v. Wolk,* 466 F.2d 1143, 1145-1146 (8th Cir. 1972); *United States v. Iannelli,* 477 F.2d 999, 1003 (3d Cir. 1973), *affirmed on other grounds,* 420 U.S. 770 (1975); *United States v. Smith,* 463 F.2d 710, 711 (10th Cir. 1972); *United States v. Rizzo,* 492 F.2d 443, 447 (2d Cir. 1974). These decisions will be more fully discussed at pp. 30-31, *infra.*

B. The government must perform its duty to supply information with some greater degree of care than that exercised in this case.

Whatever standard is employed in prescribing the scope of the government's duty to inform the trial court of persons overheard in a wiretap, the government must be held accountable to exercise it with at least the care to which attorneys are generally held in their representations to the court. And in view of the constitutional underpinnings of the inventory notice provisions of Title III (discussed at pp. 16-25, *infra*, in connection with the appropriateness of suppression as a remedy for failure to serve notice), it would be proper to require the government to exercise a high degree of care. The government concedes that "best efforts" might be an appropriate standard (Brief, p. 44), but its efforts in this case were a sorry "best."

When, in the course of re-examining its list of overheard persons whom it intended to indict, the government discovered that the names of Trifler and Blank had been omitted, a careful examination of the file for other missing names would certainly have been expected. Merlo and Lauer had been positively identified. They were named in tapes and interview reports in the hands of the government.[8] The effort to gloss the lack of notice to them as "administrative oversight" or "inadvertent error" is a euphemism for plain negligence or worse.

For the reasons expressed above, this case provides no occasion for the court to rule upon the scope of the government's duty to provide threshold information as to persons overheard in telephone intercepts under Title III. Even if this Court does determine to announce, in its decision in this case, a rule concerning the government's duty to inform the court, no standard less than that prescribed by *United States v. Chun, supra,* would be sufficient to enable the trial judge to exercise his statutory discretion under 18 U.S.C. §2518(8)(d). However, if the government is held to a lesser degree of diligence in providing such information as the trial court may request, suppression of the Merlo and Lauer intercepts is justified.

8. See pp. 5-6, *supra*.

II. SUPPRESSION OF THE INTERCEPTIONS OF THESE RESPONDENTS' TELEPHONE COMMUNICATIONS WAS REQUIRED.

(A) For the reasons expressed in the following paragraphs, the inventory notice provisions contained in Section 2518(8)(d) occupy a central role in the statutory scheme to limit indiscriminate wiretapping. Suppression is therefore available as a remedy for violation of these provisions both under the precepts of *United States v. Giordano*, 416 U.S. 505 (1974) and (B) under the language of the suppression statutes themselves. (C) Suppression as a remedy for lack of an inventory notice should not depend upon whether the government's failure to serve the notice was deliberate or inadvertent, or upon whether specific prejudice to the defendant has been shown. (D) However, in any event the violation of the inventory notice requirements presented by this case was substantial and necessarily prejudicial to these respondents. (E) Moreover, the Fourth Amendment requires the suppression of wiretaps where post-interception notice is lacking. (F) Finally, the imposition of suppression as a remedy for substantial violations of the inventory notice requirements will present no serious problems to the government in the administration of Title III.

A. The inventory notice provisions occupy a central role in the statutory scheme to limit indiscriminate wiretapping, so that suppression is available as a statutory remedy for lack of the notice under the precepts of United States v. Giordano.

Section 2518(10)(a) of Title III provides for suppression of an intercepted communication on the following grounds:

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. §2518(10)(a).

In *United States v. Giordano*,[9] this Court held that the words "unlawfully intercepted" in subsection (i) quoted above were "not limited to constitutional violations" 416 U.S. at 527, and that

> "Congress intended to *require suppression* where there is failure to satisfy *any* of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id.*, at 527 (Emphasis added).

In *Giordano*, this Court held that the statutory provisions which "condition the use of intercept procedures upon the judgment of a senior official in the Department

9. 416 U.S. 505 (1974).

of Justice" (*Id.*, at 528) were "intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored." *Ibid.*

The legislative history of the inventory notice provisions set out in Section 2518(8)(d) demonstrates that these provisions occupy no less a central role in the prevention of unconstitutional and unlawful uses of the "extraordinary investigative device"[10] authorized by Title III.

Senate Report No. 1097, 90th Cong., 2d Sess. (1968), the "principal piece of legislative history" concerning Title III, to which this Court has repeatedly referred in its adjudications under the Omnibus Crime Control Act[11] discloses that the framers of Title III regarded the inventory notice provisions as fundamental to the Fourth Amendment validity of the Act.

In *Berger v. New York*, 388 U.S. 41 (1967), this Court applied the Fourth Amendment's prohibition of unreasonable searches and seizures to wiretaps and electronic eavesdropping, and invalidated New York's eavesdropping law for failure to meet Fourth Amendment criteria. One of the specific fatal defects noted in *Berger* was that:

> ". . . the statute's procedure, necessarily because its success depends on secrecy, *has no requirement for notice as do conventional warrants*, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits uncontested entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice would appear more important in eavesdropping, with its in-

10. *United States v. Giordano*, 416 U.S. 505, 527 (1974).

11. *Giordano, supra*, at 528-529.

herent dangers, than that required when conventional procedures of search and seizure are utilized. *Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties.* In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." (Emphasis added). *Id.*, at 60.[12]

A few months after its *Berger* decision, this Court struck down a federal warrantless search, in part, because the searching officers were not

> "directed, after the searching had been completed, to notify the authorizing magistrate *in detail of all that had been seized.*" *Katz v. United States*, 398 U.S. 347, 356 (1967). (Emphasis added).

The framers of Title III expressly declared their intention to adopt and follow the constitutional guidelines of both *Berger* and *Katz*.

> "Working from the hypothesis that any wiretapping and electronic surveillance legislation should include the . . . constitutional standards [of *Berger* and *Katz*], the sub-committee has used the *Berger* and *Katz* decisions as a guide in drafting Title III." Senate Report (Judiciary Committee), No. 1097, 2 U.S. Code Congressional and Administrative News 1968 p. 2112, at p. 2163.

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12. Many years earlier this Court had condemned the "secret" taking of property, and the illegal use of "stealth" as constituting Fourth Amendment violations no less than illegal use of force. *Gouled v. United States*, 255 U.S. 298, 305-306 (1921). While *Gouled* has been narrowly overruled insofar as it prohibits seizure of "mere evidence", see *Warden v. Hayden*, 387 U.S. 294 (1967), its denunciation of secret intrusions upon privacy remains undisturbed.

The requirement "to notify the authorizing magistrate, after the search, of all that had been seized" found lacking in *Katz*, was one of the constitutional standards specifically noted by the sub-committee. *Id.*, at 2162. Accordingly, the portion of the section-by-section analysis, contained in the Senate Report 1097, on subparagraph (8)(d), describes the purposes of the inventory notice in mandatory and constitutional terms:

> "Subparagraph (d) places on the judge the duty of causing an inventory to be served by the law enforcement agency on the person named in an order authorizing or approving an interception. This reflects existing search warrant practice. See Federal Rules of Criminal Procedures, 41(c); *Berger v. New York*, 87 S. Ct. 1873, 388 U.S. 41 (1967); *Katz v. United States*, 88 S. Ct. 507, 389 U.S. 347 (1967). The inventory must be filed within a reasonable period of time, but not later than 90 days after the interception is terminated. It must include notice of the entry of the order, the date of its entry, the period of authorized or approved interception, and whether or not wire or oral communications were intercepted. On an ex parte showing of good cause, *the serving of the inventory may be, not dispensed with, but postponed.* For example, where interception is discontinued at one location, when the subject moves, but is reestablished at the subject's new location, or the investigation itself is still in progress, even though interception is terminated at any one place, the inventory due at the first location could be postponed until the investigation is complete. In other situations, where the interception relates, for example, to a matter involving or touching on the national security interests, it might be expected that the period of postponement could

be extended almost indefinitely. Yet the intent of the provision is that *the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least to the subject.* He can then seek appropriate civil redress for example, under section 2520, discussed below, if he feels that his privacy has been unlawfully invaded." *Id.*, at 2194 (Emphasis added).

The Senate Report echoes earlier conclusions of the President's Commission on Law Enforcement and Administration of Justice, the recommendations of which sparked the enactment of Title III. After discussing the particular perniciousness of the surreptitious character of electronic surveillance, and the general Fourth Amendment requirement that "all searches must be on notice," the Commission concluded

"There is no reason why some sort of inventory procedure applicable to electronic surveillance warrants could not be worked out. Warrant procedures prior to use of electronic equipment and *inventory procedures subsequent to its use would help limit the indiscriminate use of the devices.* More importantly, they would make possible prior and subsequent judicial review of their use and possible abuse." *The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime,* 80, 97, 103 (1967) (Emphasis added).

The President's Commission had commissioned Professor Robert Blakely of Notre Dame Law School to prepare a draft statute on wiretapping, and the Blakely draft contained provisions for notice to the subject that wire-

tapping or eavesdropping has taken place. 114 Cong. Rec. 14475 (1968). Reading from and commenting on a subcommittee report on the Blakely draft during the floor consideration of Title III, Senator Long remarked on the significance of the inventory notice provisions as follows:

"This provision, though unique in this area, may be derived from an analogous procedure in the area of searches and seizures, where the inventory functions as a receipt for what was taken. *The principal significance of the inventory in this area, however, is that it lifts the secrecy from the tap or bug.* Presumably the intention is thus to reduce the uncertainty which one might have as to whether or not he has been subjected to electronic surveillance.

"We approve of this provision, and believe it should be a part of the legislative scheme recommended by this Report." *Ibid.* See also Senator Hart's remarks, *id.* at 14485-86.

Thus, the critical distinction between the inventory and return in a conventional search and the inventory notice of electronic surveillance emerges from the Senate deliberations. While protecting important interests in accounting for what is seized, the inventory in a conventional search is not essential to provide notice of the search and prevent intolerable secret intrusions into privacy.[13] Without such provisions, however, Title III could not pass constitutional muster under the opinions of this

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13. This factor distinguishes the cases, referred to by the government at page 55 of its Brief, upholding conventional searches despite "ministerial" failure to deliver a return and inventory. See *United States v. Dudek,* 530 F.2d 684 (6th Cir. 1975); *United States v. Hall,* 505 F.2d 961 (3d Cir. 1974); *United States v. Harrington,* 504 F.2d 130, 134 (7th Cir. 1974); *United States v. McKenzie,* 446 F.2d 949 (6th Cir. 1971); *Evans v. United States,* 242 F.2d 534 (6th Cir. 1957).

Court in *Berger* and *Katz* and in the minds of the congressional framers.

As the government has noted,[14] the particular provision at issue in this case, which gives the trial court discretion to serve notice upon persons not named in the order, was added by amendment on the Senate floor. Amendment No. 754, 114 Cong. Rec. 14485-14486 (1968). However, the government seeks to escape the implication of the floor consideration of this amendment. Like the mandatory notice to persons named in the order, the discretionary notice was regarded as "important" (*Id.* at 14485) and necessitated by the *Berger* and *Katz* decisions under the Fourth Amendment which "established that notice of surveillance is a constitutional requirement of any surveillance statute." *Ibid.*

The government's contention on this point is misleading. The government argues in effect, that congressional concern for discretionary notice has been rendered unimportant because "[m]andatory notice only to those named in the order has since been held to satisfy the Constitution." Brief, pp. 43-44, n. 38 citing *United States v. Ramsey*, 503 F.2d 524, 531 n. 24 (7th Cir. 1974), *cert. den.*, 420 U.S. 932 (1975); *United States v. Tortorello*, 480 F.2d 764, 774 (2d Cir. 1973), *cert. den.*, 414 U.S. 866 (1973); *United States v. Whitaker*, 474 F.2d 1246 (3d Cir. 1973), *cert. den.*, 412 U.S. 953 (1973); *United States v. Cafero*, 473 F.2d 489, 498-500 (3d Cir. 1973), *cert. den.*, 417 U.S. 918 (1974); *United States v. Cox*, 462 F.2d 1293, 1303-1304 (8th Cir. 1972), *cert. den.*, 417 U.S. 918 (1974); *United States v. Cox*, 449 F.2d 679, 685, 687 (10th Cir. 1971), *cert. den.*, 406 U.S. 934 (1972). To be sure, these cases generally approved the constitutionality of Title III, which provides for mandatory notice only to persons named in the order. However, Title III also provides for discretionary notice to others who may have been overheard, and none of these cases held that discretionary notice to such persons is constitutionally unnecessary or unimportant to the legislative scheme.

14. Brief for United States, p. 43, n. 38.

In the light of the legislative history discussed above, federal appellate courts have in fact held that §2518 (8)(d) is an "integral part of the system of limitation [in Title III] designed to protect privacy,"[15] the wording of which "implements the Fourth Amendment;"[16] that "the inventory notice provision is a central or at least a functional safeguard in the statutory scheme."[17] In the words of the court below, "the inventory notice provisions have a centrol role in limiting the use of intercept procedures." 513 F.2d at 344. These cases accordingly applied the suppression remedy for violation of Section 2518(8)(d) in keeping with the holdings of this Court in *United States v. Giordano*, 416 U.S. 505 (1974), as reaffirmed in *United States v. Chavez*, 416 U.S. 562 (1974) and *United States v. Kahn*, 415 U.S. 143 (1974).

B. The violation of the inventory notice requirements renders the communication unlawfully intercepted within the suppression provisions of Sections 2515 and 2518(10)(a).

While the government argues that it would require excessive "stretching" to hold that a "communication was unlawfully intercepted" for purposes of the suppression

15. *United States v. Eastman*, 465 F.2d 1057, 1062 (3d Cir. 1972), quoting 1968 U.S. Code Cong. and Adm. News, at pp. 2184-2185.

16. *Id.* at 1063.

17. *United States v. Chun*, 503 F.2d 533, 542 (9th Cir. 1974); see also *United States v. Civella*, 19 Cr. L. 2136, 2137 (8th Cir. Nos. 75-1525, 1528, 1530, 1532, April 16, 1976).

sanction of Section 2518(10)(a)(i),[18] in fact no stretching at all is required. As the government appears to concede[19] and as the Court of Appeals for the Third Circuit has held,[20] Section 2518(10)(a)(i) must be read in conjunction with §2515 which provides, *inter alia*:

> "Whenever any wire or oral communication has been intercepted, *no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial* . . . before any court . . . *if the disclosure of that information would be in violation of this chapter.*" (Emphasis added).

Section 2515 alone has been held by this Court to require the exclusion of wiretaps which violate Title III even where a motion to suppress would be inapropos. See *Gelbard v. United States*, 408 U.S. 41 (1972). The reasoning of the Court of Appeals for the Third Circuit in *United States v. Eastman* is, in essence, that an interception which is not followed by compliance with the inventory notice provisions of Section 2518(8)(d) is "in violation of this chapter" (465 F.2d at 1062) and thus an unlawful interception for purposes of Section 2518(10)(a)(i).[21] This result is suggested by this Court's formulation, in *Giordano*, that suppression is required under §2518(10)(a) for violations (which are not limited to those of constitutional dimension, 416 U.S. at 527) of "*any* of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures."[22]

18. Brief, p. 46.

19. *Ibid.*

20. *United States v. Eastman*, 465 F.2d 1057, 1061 (3d Cir. 1972).

21. The complete reasoning of *Eastman* is that

> "[i]n order to determine if 'the disclosure of that information [i.e., the contents of the interception] would be in violation of this chapter,' we look to §§2511, 2517, and 2518(8)(d). Section 2511 prohibits any willful use of an interception 'except as otherwise specifically provided in this chapter.' Section 2517(3), . . . is an exception to §2511 and allows the disclosure of a wiretap at trial if 'intercepted in accordance with the provisions of this chapter.' Since the interception in this case was not in accordance with the provisions of this chapter, i.e., §2518(8)(d), as discussed above, it follows that

(*Footnote continued on following page*)

C. Suppression for lack of an inventory notice should not depend upon advertence or prejudice.

As at least three federal courts have now reasoned, a showing of prejudice to the defendant or advertent[23] omission of the notice is unnecessary to the availability of the suppression remedy.

In *United States v. Chun*, 503 F.2d 533 (1974), the Court of Appeals reversed the suppression order and remanded the case to the District Court for further consideration in the light of the holding of *United States v. Giordano*[24] that violations of "central" safeguards require suppression, and the statement in *United States v. Chavez*,[25] that *Giordano* did not "suggest that every failure to comply fully with any requirement provided in Title III would render the interception . . . 'unlawful.'" 503 F.2d at 542-

Footnote continued—

> the disclosure of the contents of the wiretap was in violation of this chapter, i.e., 'a willful use of an interception under §2511 and the statutory rule would apply here.'" 465 F.2d at 1062, quoting, in part, *United States v. Narducci*, 341 F. Supp. 1107, 1117 (E.D. Pa. 1972).

22. 416 U.S. at 527 (Emphasis added).

23. In *United States v. Eastman*, 465 F.2d 1057 (3d Cir. 1972), suppression flowed from the trial judge's deliberate waiver of the inventory notice requirement.

24. 416 U.S. 505 (1974).

25. 416 U.S. 562, 574 (1974).

543. On remand, the District Court held that "the judicial officer in the exercise of his discretion could not constitutionally exclude unnamed but overheard *prospective defendants* from the inventory notice . . .";[26] that failure of the government to notify the court "that these unnamed individuals had been overheard and that they were prospective defendants"[27] violated both the "spirit and the letter" of the inventory notice clause, which is a "central or functional safeguard" requiring suppression under *Giordano* precepts; and that the "reason why the judicial officer did not order inventory notice to be given . . . is immaterial." *United States v. Chun,* 386 F. Supp. 91, 96 (Hawaii Dist. 1974).

In *United States v. Civella,*[28] the Court of Appeals for the Eighth Circuit concluded that its prior decision which denied suppression for violation of the inventory notice requirement in the absence of prejudice, *United States v. Wolk,*[29] was decided prior to this Court's rulings in *Giordano* and *Chavez* and "perhaps too much reliance should not be placed on it today." (Slip Op. p. 22). The *Civella* opinion considered the decisions of this Court to date as requiring that

> "where there is a substantial violation of a central and significant provision of the Act, suppression may be required even where the government has acted in good faith and the party whose communications have been intercepted has sustained no actual prejudice as a result of the violation." Slip Op. p. 10.

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26. *United States v. Chun,* 386 F. Supp. 91, 96 (Hawaii Dist. 1974).

27. *Ibid.*

28. 19 Cr. L. 2136, Case Nos. 75-1522, 1525, 1528, 1530, 1532 (8th Cir. April 16, 1976).

29. 466 F.2d 1143 (8th Cir. 1972).

Agreeing with *Chun, supra,* and the Court below, that Section 2518(8)(d) is such a central provision, it granted suppression for lack of substantial compliance with its provisions.

The court below came to a similar conclusion.

> "Either the Government's *deliberate circumvention,* see *United States v. Eastman,* 465 F.2d 1057 (3d Cir. 1972), or an *inadvertent error* may require suppression. Although certain cases decided prior to *Giordano* and *Chavez* indicate that, in the absence of actual notice, the prejudice to the defendants is a factor to be considered, see *United States v. Cirillo,* 499 F.2d 872, 882-883 (2d Cir. 1974); *United States v. Wolk,* 466 F.2d 1143, 1146 (8th Cir. 1972), *Giordano* states that if the provision plays a 'central role' that 'suppression must follow when it is shown that this statutory requirement has been ignored.' 416 U.S. at 529, 94 S.Ct. at 1832." 513 F.2d at 343. (Emphasis added, footnote omitted).

The reasoning of these federal decisions is compelling. For as this Court also noted in *Giordano,* the purpose of Title III was "effectively to prohibit . . . all interceptions of oral and wire communications except those specifically provided for in the Act. . . ." 416 U.S. at 514. And this Court has held that the *"fundamental policy* adopted by Congress on the subject of wiretapping and electronic surveillance . . . is *strictly* to *limit* the employment of those techniques of acquiring information. . . ." *Gelbard v. United States,* 408 U.S. 41, 57 (1972) (Emphasis added). "[A]lthough Title III authorizes invasions of individual privacy under certain circumstances, *the protection of privacy was an overriding congressional concern." Id.,* at 48 (Emphasis added, footnote omitted).

The congressional purposes noted by this Court would hardly be served by any rule which places upon the defendant, against whom the fruits of surreptitious surveillance are being used, the onus of establishing the generally unknowable facts concerning the government's state of mind in failing to notify him of the eavesdropping, or of establishing that he has been especially prejudiced by the lack of notice of the secret electronic search.[30] It should suffice that he has been denied the protection of the central safeguard which Congress thought "should insure . . . that the techniques are reasonably employed."[31]

D. The violation of the inventory notice requirements in this case was substantial and prejudicial.

There is strong reason for this Court to rule that any significant violation of Section 2518(8)(d) justifies suppression of the wiretap. See argument at pp. 25-27, *supra*.

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30. It is not unknown for a federal agent applying for a wiretap order deliberately to mislead a judge. See *United States v. Bellosi*, 501 F.2d 833, 835 (D.C. Cir. 1974). The defendant's remedy should not depend upon his ability to ferret out deception by law enforcement personnel.

31. 2 U.S. Code Cong. and Admin. News, p. 2144 (1968). The contrary position of the drafters of the *Commentary on Standards Relating to Electronic Surveillance, American Bar Association Project on Minimum Standards for Criminal Justice* (Approved Draft 1971, p. 160), that "[a] failure . . . to file the inventory . . . should result in the suppression of evidence only where prejudice is shown" is ill conceived. The Commentary, which unlike the black type standards was not approved by the House of Delegates, and therefore constitutes only the predilections of a majority of the drafting committee, is based (at p. 160) on *Evans v. United States*, 242 F.2d 534 (6th Cir. 1957), *cert. den.*, 353 U.S. 976 (1957). *Evans* dealt with a conventional search, not a Title III intercept. Since the conventional inventory does not fulfill the Title III inventory's function of lifting secrecy from the search, the reference to *Evans* manifests a serious misconception of the statutory scheme.

However the government's failure to serve inventory notices on Merlo and Lauer requires suppression even under a narrower view of this remedy.

The Court below held that "[t]here is *no suggestion* in the present case that the Government fulfilled its duty under the statute *or that there was even a colorable conformity with the statutory requirements.*" 513 F.2d at 343.[32] Under comparable circumstances where there was no effort to serve an inventory notice upon one of several defendants, even though others had been served, the Court of Appeals for the Eighth Circuit has held that suppression must result. *United States v. Civella*, 19 Cr. L. 2136, 2137 (8th Cir., April 16, 1976).[33] In so holding, the *Civella* court differentiated such total failure from brief delay, which it held does not require suppression (*Ibid.*). In *Civella*, the court also came to a contrary result from its previous inventory notice ruling, in which it denied suppression where there was a few months' delay between the tap and notice or knowledge to the defendants on the basis that "the statute has been substantially complied with. . . ." *United States v. Wolk*, 466 F.2d 1143, 1144, 1146 (8th Cir. 1972) (see further discussion of *Wolk* at p. 31, n. 36, *infra*).

Respondents Merlo and Lauer never received an inventory notice and did not have actual knowledge of the interceptions for more than a year after they took place.[34]

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32. Failure to include Merlo and Lauer in the list was at least negligent. See pp. 5-7, *supra*. The government's reference at Brief pp. 53-54, to the dictum in *Michigan v. Tucker*, 417 U.S. 433, 447, and *United States v. Peltier*, 422 U.S. 531 (1975), concerning the unimportance of the deterrence rationale where official action is in good faith is thus misplaced.

33. Case Nos. 75-1522, 1525, 1528, 1530, 1532.

34. As the Court below noted. 513 F.2d at 343.

While the government urges that Merlo and Lauer were not prejudiced by the delay (Brief, p. 45), this contention is specious. It defies belief that these persons and their counsel could not have employed to their defensive advantage the timely knowledge that they were under the surveillance of law enforcement authorities. Moreover, this delay of more than a full year had the necessary effect of rendering stale any defense investigation of the circumstances and events existing at the time of the clandestine surveillance. Witnesses become unavailable or unfriendly. Documents are discarded. The memory of exculpating circumstances fades. If these respondents had known of the wiretaps in a timely manner they would have understood that an investigation was focused on them in February of 1973, when the notice was served (App. 120-121), instead of the following November when they were indicted; and their counsel could have commenced preparations almost a year earlier.

In the cases cited by the government (at p. 41 of its Brief) the denial of suppression was based upon innocuous facts which did not amount to substantial violations of the inventory requirements, and are in no way comparable to the substantial violation presented in this case.

Thus suppression has been denied because the defendant acquired knowledge of the intercepts within the statutory ninety-day period,[35] where there has been substantial

35. *United States v. Iannelli*, 477 F.2d 999, 1003 (3d Cir. 1973) *affirmed on other grounds*, 420 U.S. 770 (1975). This fact was commented on in the remand opinion in *United States v. Chun*, 386 F. Supp. 91, 95 (D. Hawaii 1974), as the distinguishing feature justifying suppression in *Chun*. See also the District Court opinion in *Iannelli*, 339 F. Supp. 171 (W.D.Pa. 1972). Actual notice within ninety days was also one of the bases for sustaining the intercept in *United States v. Smith*, 463 F.2d 710 (10th Cir. 1972). Actual knowledge was found lacking in the instant case.

compliance with the statute and only brief delay of one or two months beyond the statutory period[36] or less.[37]

The law pertaining to suppression of interceptions for lack of inventory notice, as thus far developed by these federal appellate decisions, has in no instance sustained a wiretap where there has been (i) lack of even colorable compliance with Section 2518(8)(d) as to a particular defendant, or (ii) long delay. In the instant case, there was both total lack of even colorable compliance or actual notice, and a protracted delay from which prejudice can be inferred.

Based upon the foregoing considerations, if this Court should deem it appropriate to construe the suppression remedy as available only where lack of colorable compliance, negligence of the government, or prejudice are shown, the suppression of the Merlo and Lauer wiretaps must nevertheless stand.

E. Suppression is required by the Fourth Amendment.

As previously discussed, the inventory notice requirement of Section 2518(8)(d) "implements the Fourth Amendment"[38] which, as this Court has held in *Gouled*,

36. *United States v. Wolk*, 466 F.2d 1143 (8th Cir. 1972) (inventories ordered served in June; actual knowledge obtained in July or August); *United States v. Rizzo*, 492 F.2d 443 (2d Cir. 1974). The circumstances of the delay are not described in the opinion in *United States* v. *Bohn*, 508 F.2d 1145, 1148 (8th Cir. 1975), but the Eighth Circuit position that suppression follows substantial notice violations is made clear in *United States v. Civella, supra*.

37. In *United States v. Smith, supra*, actual knowledge during the period was followed by statutory notice a mere thirty hours late, and the Court so noted. 463 F.2d at 711.

38. *United States v. Eastman*, 465 F.2d 1057, 1063 (3d Cir. 1972).

Berger and *Katz*, is severely offended by secret searches without notice. The victim of such a search is deprived of his Fourth Amendment rights by any substantial failure to notify him irrespective of the advertence of the failure, or any prejudice in subsequent criminal proceedings.

Where wiretapping is involved, the post-search inventory notice constitutes the only notice of the search. Thus, contrary to the govérnment's contentions (Brief, p. 50), the judicially created exclusionary rule under the Fourth Amendment requires no extension to support the suppression of any wiretap where there has been a substantial failure to notify the defendant.[39] Suppression is mandated by the exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961).

F. Suppression as a remedy for substantial violations of the inventory notice requirements should present no serious problems in the administration of Title III.

In its appraisal of the availability of suppression as a remedy for improper wire interception procedures, this Court has considered whether suppression would "greatly subvert the effectiveness of the law enforcement mechanism that Congress created." *United States v. Kahn*, 415 U.S. 143, 153 (1974). Suppression has been upheld to enforce the requirement of proper Justice Department authorization to the applicant for an intercept order—a matter well within the government's control. *United States v. Giordano*, 416 U.S. 505 (1974). Conversely, suppression

39. There is thus no need to "press the scope of the suppression remedy beyond present search and seizure law. . . ." Suppression for lack of an inventory notice is within the pattern contemplated by the framers of Title III. S. Rep. No. 1097, *supra*, at p. 96.

has been denied where the effect would have been to require thorough prior investigation of all persons likely to use the phone. *United States v. Kahn, supra.*

Suppression in the instant case creates no administrative burdens for the government beyond the exercise of a degree of care in the administration of its obviously prudent policy of providing "the supervising judge with the name of every person who has been overheard if there is any reasonable possibility that the person will be indicted." (Petition for Certiorari herein, p. 15).

The Court below expressly found that "this is not a case where a strict interpretation of the statute would render the statute essentially useless for law enforcement purposes as in *United States v. Kahn*. . . ." 513 F.2d at 343. It is thus possible to give effect to the congressional purposes of "protecting individual privacy"[40] without destroying the wiretap as a weapon against organized crime.[41]

Almost a decade ago, this Court recognized that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41 (1967). In order to limit the pernicious secrecy attendant upon wiretapping, which this Court has repeatedly addressed with gravest concern, it is necessary that strict compliance with the inventory notice provisions be required. The rulings below suppressing the intercepts for lack of notice to respondents Merlo and Lauer should remain undisturbed.

40. *United States v. Kahn*, 415 U.S. 143, 151 (1974).

41. *Ibid.*

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

BERNARD A. BERKMAN
JOSHUA J. KANCELBAUM
BERKMAN, GORDON, KANCELBAUM AND LEVY
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245
Attorneys for Respondents Jacob Joseph Lauer and Joseph Francis Merlo

APPENDIX

18 U.S.C. Section 2515

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.